RECEIVED
AUG 30 1979
OFFICE OF THE
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP,
REPRESENTED BY THE TE-MOAK BANDS
OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REID PEYTON CHAMBERS
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Washington, D.C. 20036

August, 1979

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 2

STATEMENT

A. Proceedings before the Indian Claims Commission 3

B. Western Shoshone motion for a stay 4

C. Western Shoshone petition to the President and Secretary of the Interior 7

D. Court of Claims disposition of the appeal 8

REASONS FOR GRANTING THE WRIT

1. The decision below works a grievous injustice because if forces Indians to take money damages for lands they still may beneficially own without ever having the merits of their title claim determined 9

2. The decision below bars Indian tribes from asserting title to any lands covered by a petition pending under the Indian Claims Commission Act unless the tribe abandons the entire claim 11

3. The decision below perverts the purpose of a landmark federal statute designed to benefit Indians 13

4. The decision conflicts with a holding of the Court of Appeals for the Ninth Circuit in a case involving Western Shoshone 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 12

Beecher v. Wetherby, 95 U.S. 517 (1877) 10

Cases, continued: Page

Buttz v. Northern Pacific R., 119 U.S. 55 (1886) 10

Cramer v. United States, 261 U.S. 219 (1923) 10

Friederichsen v. Renard, 247 U.S. 207 (1918) 12

Holden v. Joy, 84 U.S. (17 Wall) 211 (1872) 10

Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823) 10

Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) 10

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 12

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 10, 11, 12

Pueblo of Taos v. United States, 22 Ind. Cl. Comm. 444 (1970) 15

Squire v. Capoeman, 351 U.S. 1 (1956) 12

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 4, 15

United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946) 14

United States v. Dann, 572 F.2d 222 (C.A. 9, 1978) . . 6, 16, 17

United States v. John, 437 U.S. 634 (1978) 6

United States v. Santa Fe Pac. R., 314 U.S. 339 (1941) 10

United States v. 93.970 Acres of Land, 360 U.S. 328 (1959) 12

Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 318 (1977) 6, 7

Western Shoshone Legal Defense & Educ. Ass'n. v. United States, 209 Ct. Cl. 43, 531 F.2d 495, cert. denied 429 U.S. 885 (1976) 3, 5

Yakima Tribe v. United States, 20 Ind. Cl. Comm. 76 (1968) 15

Yakima Tribe v. United States, 29 Ind. Cl. Comm. 125 (1972) 15

Page

Treaties and Statutes:

Act of October 21, 1976, 90 Stat. 2721 13

Act of October 25, 1972, §3(a), 86 Stat. 1176, 28 U.S.C. 2409a 13

Indian Claims Commission Act of 1946, 25 U.S.C. 70, 70i, 70u 2, 3, 6, 13, 15

Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq* 3, 6

Ruby Valley Treaty of October 1, 1863, 18 Stat. 689 . . . . . 2, 5

25 U.S.C. 70s(c) 2

25 U.S.C. 81 *et seq.* 7

25 U.S.C. 177 11

28 U.S.C. 1255(1) 2

Miscellaneous:

Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28 (1947) 10

Election of Remedies: A Delusion, 38 Colum. L. Rev. 292 (1938) 12

Hines: *Election of Remedies: A Criticism*, 26 Harv. L. Rev. 707 (1913) 12

H. Rep. No. 1466, 79th Cong. 1st Sess (1945) 14

MOORE'S FEDERAL PRACTICE (1979) 12

Note, American Indian Land Claims: Land Versus Money as a Remedy, 25 U. of Fla. L. Rev. 308 (1973) 10

Note, Indian Title: The Rights of American Natives to Lands They Have Occupied Since Time Immemorial, 75 Colum. L. Rev. 655 (1975) 10

PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: *Harry S. Truman 1946* (G. P. O. 1962) 14

92 Cong. Rec. 5312, 5318, 5319, 5320 14

42 Ops. A.G. 441 (1972) 15

APPENDICES:

	Page
A. Opinion Below	1a
B. Order of Court of Claims denying motion for rehearing	15a
C. Final award of Indian Claims Commission	17a
D. Order of Indian Claims Commission	19a
E. Excerpts from opinion of Indian Claims Commission	25a
F. Ruby Valley Treaty of October 1, 1863, 18 Stat. 689	29a
G. Section 22 of the Indian Claims Commission Act, 22 U.S.C. 70u	34a
H. Correspondence from the Department of the Interior to the Western Shoshone, dated January 30, 1979	35a
I. Order of Court of Claims, dated April 3, 1979	37a
J. Correspondence from the Department of the Interior to the Western Shoshone, dated June 27, 1979	41a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Western Shoshone Indians respectfully pray that a writ of certiorari issue to review the judgement of the United States Court of Claims, entered on June 1, 1979, which refuses to stay these proceedings to permit a determination of the Indians' claim that they still own some lands embraced by the judgment.

OPINIONS BELOW

The opinion of the Court of Claims, reported at 593 F.2d 994 (1979), is reprinted as Appendix A hereto. The

order denying the Western Shoshone motion for rehearing on June 1, 1979 is reprinted as Appendix B. The final award of the Indian Claims Commission, reported at 40 Ind. Cl. Comm. 453 (1977), is reprinted as Appendix C.

The Commissiom issued several opinions in this case. The Commission's order denying a stay, reported at 40 Ind. Cl. Comm. 305, is reprinted as Appendix D. Relevant excerpts from the Commission's earlier opinion determining the liability of the United States, reported at 11 Ind. Cl. Comm. 387 (1962), are reprinted as Appendix E.

JURISDICTION

The Court of Claims denied the Western Shoshone motion for rehearing on June 1, 1979. This Court has jurisdiction under 25 U.S.C. 70s(c) and 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether an Indian tribe should be denied the opportunity to have its claim to beneficial ownership of lands decided, and forced under the Indian Claims Commission Act to take a money award as compensation for lands it may still own, where its claim of title has never been determined on the merits and payment of the money will bar subsequent adjudication of the title claim?

STATUTES INVOLVED

The Ruby Valley Treaty of October 1, 1863, 18 Stat. 689, is reprinted as Appendix F.

Section 22 of the Indian Claims Commission Act of August 13, 1946, 25 U.S.C. 70u, is set out as Appendix G.

STATEMENT

A. *Proceedings before the Indian Claims Commission*

In 1951 the Western Shoshone, represented by the Te-Moak Bands of Western Shoshone Indians,[1] filed a petition before the Indian Claims Commission to recover money damages from the United States for various historic wrongs, including generally the taking of lands aboriginally owned by the Western Shoshone. The Western Shoshone were then represented by counsel pursuant to a contingent fee contract with the Te-Moak Bands setting counsel's compensation as a percentage of money damages awarded.

The Commission held a hearing to determine liability in 1957. Counsel representing the Western Shoshone presented evidence that they aboriginally owned millions of acres in Nevada, California and Utah. No evidence was introduced on how, if at all, ownership to these lands had been extinguished. Counsel for the Indians simply stated:

> "[I]n connection with the question of the taking of the land involved in this case, we have not gone into the detailed step-by-step process of the taking because I think as a matter of law that is well established." [Transcript of Hearing, August 29, 1957, p. 276].

---

[1] There is no single present day band or tribe of Western Shoshone Indians. The Te-Moak Bands, one of the federally recognized bands of Western Shoshone, is organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, and has been determined to be the "exclusive representative" of the Western Shoshone under Section 10 of the Indian Claims Commission Act, 25 U.S.C. 70i. *Western Shoshone Legal Defense & Educ. Ass'n. v. United States*, 209 Ct. Cl. 43, 48-49, 52-53, 58-59, 531 F.2d 495, 497, 499, 503-504, cert. denied 429 U.S. 885 (1976); see also 11 Ind. Cl. comm. 387, 388, 445-446 (1962).

The United States, as defendant, also did not present any evidence establishing taking. The Government's sole defense was that the Western Shoshone had not aboriginally owned the lands.

The Indian Claims Commission ruled against the Government on the ownership question, holding that the Indians had aboriginally owned over 24 million acres (11 Ind. Cl. Comm. 387, 413-414 (1962) (Appendix E)). On the question of title extinction, the Commission simply stated that

> "by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands." 11 Ind. Cl. Comm. at 416.

In 1972 the Commission valued the lands[2] as of July 1, 1872—a supposed "date of taking"[3] stipulated to by counsel.

B. *Western Shoshone motion for a stay*

On November 14, 1976, the Western Shoshone moved the Commission to stay all proceedings.[4] At the same

---

[2] The Commission's opinion and findings as to valuation are reported at 29 Ind. Cl. Comm. 5 (1972). No issue concerning valuation is raised by this Petition.

[3] Under the Indian Claims Commission Act, lands are valued as of the date of taking. Interest is not paid where title has not been "recognized." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). This historic value, of course, is generally much below present value of the lands.

[4] Prior to 1976, the Commission had rejected an attempt by a private, voluntary assocation of Western Shoshone to intervene

[footnote continued]

time, they discharged their contingent fee claims counsel. The Western Shoshone sought this stay because they believe that the United States still holds in trust for them several million acres of "public" and forest lands in northeastern and central Nevada which would be embraced by the judgment.

The only treaty between the Western Shoshone and the United States, the 1863 Treaty of Ruby Valley (18 Stat. 689),[5] defines (in Article 5) the "country" of the Western Shoshone by a metes and bounds description which covers over 15 million acres in Nevada. The Treaty extinguished Western Shoshone title outside the country so described. It also authorized the United States to pass to third parties title to lands *within* Western Shoshone country used for a broad variety of private purposes including mines, mining and agricultural settlements, ranches, and mills.[6] Under the Treaty, Western Shoshone title was to be extinguished to those privately owned lands, and also to lands used for certain other purposes, such as routes of travel, military posts, station houses,[7] telegraph and stage lines and a railway.[8]

---

in the case, withdraw lands from the claim, stay all proceedings, and wrest control of the case from the Te-Moak Bands, 35 Ind. Cl. Comm. 457 (1975). The Court of Claims affirmed, *Western Shoshone Legal Defense & Educ. Ass'n. v. United States*, 209 Ct. Cl. 43, 531 F.2d 495, cert. denied, 429 U.S. 885 (1976). The court stated that the Te-Moak Bands were the exclusive representative of the Western Shoshone in this case, and that decisions such as seeking a stay and a determination of title are "precisely the kind of litigation strategy the statute [the Indian Claims Commission Act] leaves to the organized representative." 209 Ct. Cl. at 59, 531 F.2d at 503.

[5] This Treaty is reprinted as Appendix F.

[6] Treaty, Article 4.

[7] *Id.*, Article 2.

[8] *Id.*, Article 3.

The Treaty provided for reservations to be made "within the country***described" and that all Western Shoshone title would be extinguished outside these reservations. But this was never done.[9]

Title to the majority of lands within the country described in the Ruby Valley Treaty has never passed into private ownership. Most lands within the treaty area are today administered by the United States as "public" and national forest lands. The Western Shoshone claim beneficial title to these lands except for the few acres of publicly owned lands which have been used for purposes authorized in the treaty. Most Western Shoshone have never left their original country.[10] If judgment becomes final before the title question is resolved, Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70u,[11] could bar the Western Shoshone from asserting title to these lands. For these reasons, they asked the Commission to stay all proceedings until their title could be determined.

---

[9] The Duck Valley Reservation, established in 1877 for Shoshones and Paiutes, is outside the area defined by Article 5 of the Treaty, and most Western Shoshone did not remove to it. *United States v. Dann*, 572 F.2d 222, 224 (C.A. 9, 1978); see *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318, 322-324 (1977).

[10] Within this area, some Western Shoshone live on very small areas of trust land purchased in the 1930s and 1940s pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq; Compare United States v. John*, 437 U.S. 634 (1978). Others live and have lived throughout the surrounding countryside, as squatters on the "public lands," or in the towns (see generally, 40 Ind. Cl. Comm. 318, 322-329 (1977)).

[11] That section is reprinted in full as Appendix G.

On August 15, 1977, the Commission denied the Western Shoshone motion for a stay and entered final judgment. 40 Ind. Cl. Comm. 318 (1977).[12] The Western Shoshone appealed the judgment to the Court of Claims because the Commission denied the stay.[13]

C. *Western Shoshone petition to the President and Secretary of the Interior*

In February, 1977, shortly after they moved to stay the proceedings in the Commission, the Western Shoshone petitioned the President and the Secretary of the Interior to determine their title to national forest and public domain lands within their treaty country. The Te-Moak Bands also hired present counsel to represent the Western Shoshone in this proceeding and before the Executive.[14]

---

[12] At the same time, the Commission determined offsets allowable to the Government under the Indian Claims Commission Act. No issue concerning offsets is presented by this Petition.

[13] The United States cross-appealed from the portion of the judgment awarding the Western Shoshone damages for the value of minerals removed prior to the supposed 1872 "date of taking." The Court of Claims affirmed the Commission's award (593 F.2d 999-1002, Appendix A, pp. 8-14), and this issue is not raised by this Petition.

[14] Present counsel's attorneys contract, which has been approved by the Secretary of the Interior under 25 U.S.C. 81, *et seq.*, disclaims any share in the contingent fees to be awarded in this case and provides compensation on a straight hourly rate.

The Western Shoshones' contingent fee counsel contest the legality of their dismissal, and participated in the proceedings before the court below, resisting the Government's cross-appeal. The court found it unnecessary to decide any question concerning the rights of claims counsel vis-a-vis present counsel (593 F.2d at 997, App. A, pp. 4-5) and this question is not presented by this Petition.

The Secretary of the Interior initially declined to consider the Western Shoshone petition unless a stay were first obtained. While the appeal was pending before the Court of Claims, but after oral argument, the Interior Department changed its position. The Department advised the Western Shoshone that it would attempt to resolve "the issues presented in the Western Shoshone petition and***pending litigation" by investigating "the conditions of the Western Shoshone" and considering the creation of additional reservations. (Letter of January 30, 1979, reprinted as Appendix H). Thereafter, the United States joined the Western Shoshone in moving the Court of Claims to stay proceedings for a three month period.

D. *Court of Claims disposition of the appeal*

Notwithstanding the joint motion of both parties, the Court of Claims affirmed denial of the stay on February 21, 1979. Although the court acknowledged that there had been no "formal extinguishment of Indians' legal title," and thus no "taking" of some of their lands (593 F.2d at 996, App. A, p. 3), it held that the filing of the Western Shoshone petition before the Commission had carried an "implied obligation of the claimant***to state his claim and stick to his statement." (Id. at 998, App. A, p. 6). The court held that the Western Shoshone could have their title claim determined only by first "abandon[ing] ***(the claims) proceeding in its entirety." (Id. at 997, App. A, p. 5) The court held that a "partial" abandonment of the petition, "contingent" on a determination of title first, was precluded by the purposes of the Indian Claims Commission Act. (*Id.* at 998, App. A, p. 6).

The Western Shoshone moved the Court of Claims for rehearing, in part supported by the United States. On April 3, 1979, that court ordered a limited stay of proceedings until May 15, 1979. (This order is reprinted as Appendix I). The court made it clear, however, that "the stay will not be extended after May 15, 1979." Negotiations between the United States and the Western Shoshone to resolve both the land claim presented by the petition to the Secretary and this case could not be concluded in this period. The court then denied the motion for rehearing (App. B). Afterwards, the Secretary of the Interior informed the Western Shoshone that the Department would no longer attempt "to undertake a program for establishing additional reservation lands" or "take any further initiative to settle the litigation." (The Secretary's letter of June 27, 1979 is reprinted as Appendix J).

On August 27, 1979, the Te-Moak Bands filed suit against the Secretaries of the Interior and Agriculture and the United States in the United States District Court for the District of Columbia to determine that the Western Shoshone beneficially own the public and forest lands within the courntry described by the Ruby Valley Treaty (Civ. No. 79-2279).

REASONS FOR GRANTING THE WRIT

1. *The decision below works a grievous injustice because it forces Indians to take money damages for lands they still may beneficially own without ever having the merits of their title claim determined.*

Western Shoshone title to much of their traditional homeland is at stake in this appeal. The decision below prematurely forecloses the Western Shoshone from

having title determined and restored. It makes the United States pay for lands which it may not actually have taken, and would forever exclude the Western Shoshone from lands they may beneficially own. It is fundamentally unfair to force an Indian tribe to take dollars for lands it still owns and which are worth far more than the "damages" awarded—expressed in nineteenth century values—and fundamentally unjust to deprive an Indian tribe of its lands without ever having a determination on the merits of its claim to ownership.

The Western Shoshone have asserted a soundly based claim to continued land ownership.[15] Their traditional

---

[15] Although the merits of the Western Shoshone claim to land ownership are not presented by this Petition and were not before the court below since it has no jurisdiction to quiet title, the claim is soldily grounded in controlling decisions of this Court. Ever since the early case of *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823), this Court has confirmed that Indian tribes hold ownership to lands they traditionally used and occupied before the coming of European settlement. Congress and only Congress can extinguish that title. E.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-669 (1974); *United States v. Santa Fe Pac. R.*, 314 U.S. 339 (1941). See generally Cohen, Original Indian Title, 32 Minn. L.Rev. 28 (1947); *Note, Indian Title: The Rights of American Natives to Lands They Have Occupied Since Time Immemorial*, 75 Colum. L.Rev. 655 (1975); *Note, American Indian Land Claims: Land Versus Money as a Remedy*, 25 U. of Fla. L.Rev. 308 (1973).

Even affirmative grants of Indian lands by Congress absent express indication of extinguishment, "convey a title to the grantees, subject***to the Indian right of occupancy." *Johnson v. McIntosh, supra* at 574; *Buttz v. Northern Pacific R.*, 119 U.S. 55 (1886); *Beecher v. Wetherby*, 95 U.S. 517 (1877); *Holden v. Joy*, 84 U.S. (17 Wall) 211 (1872). Similarly, decisions of this Court establish that administratively treating Indian lands as public domain or opening them to entry and settlement does not extinguish Indian title. E.g., *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); See also *Cramer v. United States*, 216 U.S. 219 (1923). *A fortiori*, physical intrusion by non-Indians that is not connected with a clear and plain congressional purpose to close out Indian title cannot work an extinguishment.

homelands are uniquely valuable, worth far more than money. Money once spent is gone. Tribal lands, protected from alienation by federal law,[16] can last forever to sustain the government and culture of the Western Shoshone. More is at stake in this appeal than land alone. This appeal involves a heritage, a way of life, a chance—perhaps their last—for the Western Shoshone to maintain themselves as a distinct community.

All the Western Shoshone seek is that the title to disputed lands should be validly determined before payment is made on the unexamined assumption, never litigated, that title has been lost. This should be done before money is paid, not frustrated by artifice or technicality.

2. *The decision below bars Indian tribes from asserting title to any lands covered by a petition pending under the Indian Claims Commission Act unless the tribe abandons the entire claim.*

The court below holds that—to assert a claim to ownership of *any* lands embraced by a petition filed before the Commission—a tribe must "abandon [the claims] proceeding *in its entirety*." 593 F.2d at 997, App. A, p. 5 (emphasis supplied). Moreover, the court holds that dismissal with prejudice must occur *before* a title claim may be adjudicated; abandonment cannot be "partial and contingent," as by a stay until title has been decided. *Id.* at 998, App. A, p. 6.

The court's decision would foreclose any tribe with a pending petition under the Indian Claims Commission Act from securing a determination of its claims to land embraced by the petition. It imposes the "mischievous

---

[16] E.g., 25 U.S.C. 177; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

doctrine"[17] of election of remedies on Indian litigants with unprecedented savagery. As long ago as 1918, this Court observed that this doctrine "for obvious reasons***has never been a favorite of equity." *Friederichsen v. Renard,* 247 U.S. 207, 211. More recent decisions of this Court reaffirm its disfavor for an absolutist view of election of remedies. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). *United States v. 93.970 Acres of Land,* 360 U.S. 328 (1959).[18]

Abandonment of the entire claims case would be especially unjust here. As the court below recognized (593 F.2d 997, App. A, p. 5), much Western Shoshone land—both outside the country described in the treaty and within it—was clearly taken, and most of the money award represents the value of mineral lands and minerals relinquished by the Ruby Valley Treaty. See 29 Ind. Cl. Comm. 5, 30, 42, 57 (1972). Complete abandonment of the claim would eliminate *any* compensation for these taken lands and minerals.

Even if the money award were exclusively for lands still claimed to be owned, it would be unreasonable to require—as the decision below does—abandoning a money damage remedy *before* title has been determined in a

---

[17]2 Moore's Federal Practice, para, 2.06[3] at 361. See also 1B Moore's Federal Practice, para. 0.405[7]. This doctrine has long and generally been criticized by scholars. E.g., *Election of Remedies: A Delusion?,* 38 Colum. L. Rev. 292 (1938); Hines, *Election of Remedies: A Criticism,* 26 Harv. L.Rev. 707 (1913).

[18]This Court has assiduously avoided procedural technicalities which would prevent substantive justice to Indians. E.g., *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 470-474 (1976) (bar against enjoining state taxes); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (well pleaded complaint rule); *Squire v. Capoeman,* 351 U.S. 1 (1956) (narrow construction of tax exemptions).

proceeding binding on the United States. The "contingent" abandonment proposed by the Western Shoshone request for a stay is a responsible, straight-forward procedure. The Commission and Court of Claims have no jurisdiction to award them lands. But executive agencies have jurisdiction to decide whether lands they administer are public domain or are beneficially owned by Indians. Moreover, Congress has recently broadened the waiver of sovereign immunity to permit suits for declaratory and equitable relief[19] and to quiet title to lands[20] against the United States.

The Western Shoshone reasonably sought first a determination of their title in a forum empowered to grant them relief, while preserving their rights to recover money damages if their title claim is denied. They are not trying to have their cake and eat it too, but simply to keep the part of the cake that is uneaten and be paid for the part that is gone. The Secretary of the Interior's laudable undertaking to study the land needs of the Western Shoshone and resolve both the claims litigation and the title claim recognized the justice of this position but was aborted by the court's rejection of a stay.

3. *The decision below perverts the purpose of a landmark federal statute designed to benefit Indians.*

The Act of August 13, 1946 establishing an Indian Claims Commission was the culmination of more than ten years' effort by Indian tribes and their supporters to

---

[19]The Act of October 21, 1976, 90 Stat. 2721, amends 5 U.S.C. 702 and 703 to permit actions for injunctive and declaratory relief against the United States and its officials without regard to sovereign immunity.

[20]Act of October 25, 1972, §3(a), 86 Stat. 1176, 28 U.S.C. 2409a.

redress historic wrongs. As Mr. Justice Black wrote a few months after the Indian Claims Commission Act was passed, concurring in *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 55 (1946):

> "[T]he pattern of congressional legislation***has become progressively more generous in its treatment of Indians. The capstone of this type of legislation was an Act passed by the last Congress, which established an Indian Claims Commission***.[21]

The court's holding that a stay "would have been contrary to the statutory procedure under which the suit was brought, [and] the intent and purpose of the Act ***" (593 F.2d at 998-999, App. A, p. 7) perverts the Indian Claims Commission Act by using it to force a present extinguishment of the title of Indian tribes to lands they own. This misreading of the Act simply cannot be justified in terms of its exemplary purposes. The decision below creates new injustices to Indians instead of righting old wrongs and imperils all Indian tribes with claims proceedings still pending.[22] This Court should grant the Writ to revive the "compassionate

---

[21] The Act's "primary objective" was to remove a "lingering discrimination" which had prior to 1946 prevented Indian tribes from filing claims against the United States. H.Rep. No. 1466, 79th Cong., 1st Sess. (1945) p. 2; 92 Cong. Rec. 5312 (remarks of then-Congressman Henry Jackson); *id.* at 5318 (Congressman Stigler); 5319 (Congressman Rizley, Congressman Case); 5320 (Congressman Stefan).

President Truman stated in signing the Act that it embodied "a national policy built upon fair dealing." *Public Papers of the Presidents of the United States: Harry S. Truman 1946,* p. 414 (G.P.O. 1962).

[22] As of September 1978, the Indian Claims Commission had not disposed of 68 dockets, and 20 dockets had previously been transferred by it to the Court of Claims. United States Indian Claims Commission, *Final Report,* p. 20 (1978).

purpose" of the Act's framers. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 274 and n. 2 (1955).

The court's holding also conflicts with the language and prior administration of the Act. Section 22, 25 U.S.C. 70u, reprinted in Appendix G, is very clear that a tribe is estopped from asserting a claim only after payment of a claim, not before. This section provides that "payment of any claim***shall be a full discharge of the United States" and "a final determination***made and reported***shall forever bar any further claim or demand against the United States." The converse is likewise true. Where as here payment has not been made, the United States is not discharged. Where as here a report has not been filed, a claim cannot be barred.

The Act has never before been administered to deny a stay requested by an Indian tribe for the purpose of securing executive, congressional or judicial consideration of a well-founded land claim. To the contrary, *in every other case before it,* the Indian Claims Commission granted stays in these circumstances.[23] That policy,

---

[23] For example, in November, 1968, the Commission agreed to sever from Docket 47 the Yakima Tribe's claim concerning over 21,000 acres of land around Mt. Adams, and to stay that claim "to enable the Yakima Tribe to seek restoration of those lands to the Yakima Reservation." 20 Ind. Cl. Comm. 76, 91 (1968). This stay lasted until 1972, when the Yakimas were successful in persuading the President to restore their title to the lands in question. *Yakima Tribe v. United States,* 29 Ind. Cl. Comm. 125 (1972). See also 42 ops. Atty Gen'l 441 (1972). In similar fashion, the Commission in 1970 severed the claim of the Taos Pueblo to Blue Lake from the rest of Docket No. 357, and stayed the severed proceeding on the ground that legislation was pending before Congress, *Pueblo of Taos v. United States,* 22 Ind. Cl. Comm. 444 (1970).

A stay of nearly ten years has been issued in Dockets 80-A and 80-B, claims by California Mission Tribes for deprivation of their

[footnote continued]

abandoned by the decision below, vindicates the policy of this critical Act.

4. *The decision conflicts with a holding of the Court of Appeals for the Ninth Circuit in a case involving Western Shoshone.*

The holding that filing a petition and stating that lands have been taken estops Indians from claiming title while the case is pending also directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *United States v. Dann*, 572 F.2d 222 (C.A. 9, 1978). *Dann* is a trespass action against two Western Shoshone Indians for grazing livestock on "public lands" within the treaty country without a permit from the Bureau of Land Management. The Indians' defense is that the Western Shoshone own beneficial title to the lands. The district court first granted the United States' motion for summary judgment, reasoning in an unreported opinion that the Indians were estopped from asserting title. The court of appeals reversed, and remanded the case "for the purpose of deciding title." 572 F.2d *supra* at 223. The district court recently, on July 3, 1979, heard agrument on the parties' cross motions for summary judgment and took them under advisement.

The court of appeals specifically held in *Dann* that the title question "was neither actually litigated nor actually decided in the proceedings before the ICC. [Indian Claims Commission]." 572 F.2d *supra* at 226. The court concluded that:

---

water rights, to permit the Tribes to prosecute suits in federal court asserting that their rights have never been taken. And Docket 181-D has been stayed for over two years while the Colville Tribe negotiates with federal agencies concerning administrative or legislative disposition of their entitlement to compensation.

> "The extinguishment question was not placed in issue in the litigation before the ICC. The title phase of the litigation before the ICC determines whether the Indians ever had aboriginal title before the arrival of the white man, not whether title thereafter had passed to the United States.
>
> * * *
>
> Whatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation before the ICC, the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided." *Id.* at 226-227. (footnote omitted)

The court of appeals' decision in *Dann*—that the Western Shoshone are not estopped by the pendency of the claims proceeding from litigating their title—squarely conflicts with the decision below. Unless this Court grants the Writ to consider which decision is correct, the ultimate resolution of the title question in *Dann* will be stripped of practical prospective effect.[24]

---

[24] A final judgment in this case would not moot the *Dann* case. Because the United States is suing for trespass damages, the issue in *Dann* is whether Western Shoshone title was extinguished to those lands in 1974, when the case was filed. A final judgment in this case would only estop Western Shoshone Indians from asserting ownership *after* the date of judgment, which has not yet occurred.

A likely consequence, then, of this Court's failure to grant the Writ and reverse the court below is that *Dann* will ultimately be resolved in favor of Western Shoshone title to the lands, but the Western Shoshone will be estopped by this case from profiting from that determination. That travesty of justice should be prevented.

CONCLUSION

The refusal of the court below, the Commission and the Secretary of the Interior to grant the Western Shoshone an opportunity for a decision on the merits of their claim to lands works gross injustice. It leaves these Indian people with their backs to the wall. They will lose land they have a strong claim to, forever, without a meaningful "day in court," unless this Court acts.

Although this is the most important case in their history, the Western Shoshone understand that this Court is busy with other important cases. They had hoped that lower courts and agencies would permit them to obtain a decision on the merits of their claim. This Petition is now their only hope. The Court should grant the Writ and reverse the court below.

The injustice of the decision below is manifest, the court's analysis clearly a misconstruction of the Indian Claims Commission Act and a misapplication of the election of remedies doctrine. Should this Court not entertain plenary consideration of this case, the Western Shoshone respectfully suggest that it presents an appropriate case for summary reversal and remand with instructions to the court below to stay proceedings and permit the title question to be determined.

Respectfully submitted,

REID PEYTON CHAMBERS
SONOSKY, CHAMBERS,
& SACHSE
2030 M Street, N.W.
Washington, D.C. 20036

August, 1979

APPENDIX

APPENDIX A

In the United States Court of Claims

Appeal No. 1-78
Ind. Cl. Comm. Docket No. 326-K

(Decided February 21, 1979)

THE TEMOAK BAND OF WESTERN SHOSHONE INDIANS, NEVADA, APPELLANT v. THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN INDIANS, NEVADA, APPELLEES.

Reid Peyton Chambers, attorney of record for appellant. *Sonosky, Chambers & Sachse*, and *Marvin J. Sonosky*, of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman*, for appellee United States.

Robert W. Barker, attorney of record for appellee Western Shoshone Identifiable Group, etc. *Wilkinson, Cragun & Barker, Jerry C. Straus* and *John M. Facciola*, of counsel.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, *Judge*, delivered the opinion of the court:

Both sides appeal from a judgment of the Indian Claims Commission relating to the claim of the Western Shoshones for taking of aboriginal title lands in the present States of California and Nevada. The claimants long prosecuted the claim on the basis that the entire tract was taken on a date to be determined, and because of this the claim of the Indians was money compensation only. In 1974 a group of Shoshones attempted to intervene, asserting that the claimants still own much of the tract. They wanted a stay or suspension to allow their position to be developed and presented. *See Western Shoshone* v. *United States*, 209 Ct. Cl. 43, 531 F.2d 495, *cert. denied*, 429 U.S. 885 (1976). Now new counsel representing the tribe itself, or purporting to do so, make a like contention. Defendant as appellee opposed below and opposes here any such suspension. We hold that far too much water had gone under the bridge even in 1974; we think the Commission effectuated the will of Congress more perfectly by allowing this case to come to final judgment, and we therefore affirm on appeal its decision not to suspend. In defendant's cross-appeal, its contention, which we reject, is that the Commission erred in awarding $4,604,600 as compensation for minerals removed from the tract before the stipulated valuation date of July 1, 1872. The former counsel for the Indians, not the new ones, argued for them this portion of the case. Our analyses of these issues follow, part I discussing the Indians' appeal, and part II the government's appeal.

I

The desire of the Indians to make the water flow back under the bridge is explained as a natural reaction to a visible change in legal climate, where Indian claims to own large tracts are reported in litigation or settled favorably to them, whereas, they say, in 1946 the pursuit of a money award, as made possible by the Indian Claims Commission Act, 25 U.S.C. § 70a and ff, seemed the only hope for

justice. The instant claim is one of many where the Commission was unable to discover any formal extinguishment of Indians' legal title, only gradual encroachment by settlers and others, and takings, the exact date of which could not be definitely set. 11 Ind. Cl. Comm. at 416. The Indians now claim, as not taken, only vacant land, not settled, patented, improved or mined, and no town sites. In *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 358, 393 F.2d 786, 807 (1968), it was suggested by one judge of those participating that as to vacant, unimproved land in the public domain, in Nevada, where Indian title was not formally extinguished, it had not "been taken yet" (*i.e.*, by 1968). There might be a considerable difference between an award for desert land "taken" over a century ago, but not carrying interest, and the selling price of even such desert land today, and counsel say the Indians would be able to use much of the involved land in their present way of life. Much of it is grazing land.

The proceeding was started in 1951. By stipulation filed February 11, 1966, the parties agreed that the "valuation date" for Shoshone Nevada land would be July 1, 1872. Findings as to the extent of the land taken, 22,211,753 acres in Nevada, and 2,184,650 acres in California, had already been made. A trial on valuation took place in September 1967, and following oral argument and briefing, the Commission awarded plaintiffs $21,350,000 for the Nevada land, to which it added $200,000 for California land, and $4,604,600 for removal of minerals from the Nevada land before the taking date. It deducted $9,410.11 as payment on the claim, and nothing for offsets, making a total judgment of $26,145,189.89, as entered. 40 Ind. Cl. Comm. 318, 452 (August 15, 1977).

The attempted intervention was by the Western Shoshone Legal Defense and Education Association and Frank Temoke. It was filed with the Indian Claims Commission April 18, 1974, at which time the extent and value of land and minerals taken had been determined, and only the offsets and payments then awaited adjudication. The intervenors alleged the Western Shoshones still had title to about 12 million acres, and they claimed collusion between

the Temoak Bands and the government to treat the title as extinguished. The Commission, after hearing oral argument, dismissed the intervening petition. 35 Ind. Cl. Comm. 457. This court affirmed in the decision cited above. After holding the intervenor's appeal was not premature and that we therefore had jurisdiction of it, we pointed out how belated the attempted intervention was in light of how much the Commission had done and how little remained to do; that the intervening petitioners themselves alleged they had been aware of the case for 39 years and had repeatedly protested; and that no adequate excuse was offered for the long delay. We said that the longer the delay, the better the reason for intervention that had to be shown. We held that the intervenors could not take control of the case from those then in charge unless they could show fraud, collusion, or laches, none of which was alleged except in conclusory assertions not sufficient to call for a trial. Instead of collusion, there was, we thought, a deliberate unilateral choice to claim compensation as for a "taking" of the involved lands. As regards the fear of the intervenors that they might lose the right to claim title if the case proceeded to final judgment, we pointed out that by Section 22 of the Act, 25 U.S.C. § 70u, the United States would not be discharged of any claim, including one that the Western Shoshones owned the land, until the judgment was reported to Congress, money to pay it appropriated, and payment made. The intervenors might, we said, ask Congress to delay payment.

The Temoak Band had been determined to be entitled to control the litigation on behalf of all Western Shoshone, and the intervenors were deemed by us to be non-Temoaks. Now, however, the Temoak Band itself has ostensibly changed its position. Following our remand, it petitioned the Secretary of the Interior to determine that the Western Shoshone retained ownership of the claimed acres, terminated the contract with Wilkinson, Cragun & Barker (hereinafter called old counsel), who had been in charge of this litigation hitherto, and retained Sonosky, Chambers & Sachse (hereinafter called new counsel). Old counsel have continued to participate so far as concerns the government

cross-appeal. A brief by them is on file in which they also contest the legality of their purported ouster, and say the Indians have not had a chance to vote on it, but by consent of all counsel, this issue was not argued orally. To decide it does not appear necessary for adjudication of the appeals now before us. New counsel moved for a stay of proceedings in the Indian Claims Commission, and the Commission denied the motion the same day it entered its final judgment, August 15, 1977. New counsel appealed the denial order and the judgment on November 11, 1977. It is said the Secretary is awaiting our decision on this appeal before making any move to adjudicate the title claim, but neither we nor the Commission have stayed or, it would appear, have had authority to stay, any adjudication he might engage in as to the title.

We can and do assume that the Temoaks really desire to sweep the water back under the bridge, and that they have employed new counsel to assist them in this endeavor. Any question as to the rights of new and old counsel vis-a-vis one another can wait until the proper time for adjudicating such matters. We can also put aside as irrelevant whether the course now proposed will or will not be more beneficial to the Shoshone, Temoak and others, than the one previously charted.

A different question would arise if the Temoaks desired to abandon this proceeding in its entirety. They do not. They make no claim to the title at present to ten million acres, more or less, which they still concede were taken, and eventually, their compensation to be awarded for that must come to judgment here, if the present one does not stand. Presumably, as to that as well as to the lands they do claim, if they work their will, the proceeding here must simply wait. After they have carved out whatever part they successfully claim to own, the award for the rest must be redetermined. That could be a simple matter if the parties were willing to use the record already made and the findings of the Commission. That matter does not rest in the discretion of the Temoaks alone. They cannot change their litigation position so drastically and not allow their adversary a like privilege. Defendant, also, now repents

many of the stances it has taken in the conduct of this litigation. Most likely it would not now agree to the valuation date it once stipulated. With a different valuation date, the expert appraisals would be out of court and new ones would be necessary. This lawsuit has already lasted since 1951, for reasons peculiar to this type of litigation, which no one criticizes, and it appears the Temoaks contemplate cheerfully another quarter century of litigation. The Commission's position was:

> * * * [W]e are of the opinion that it is too late in the litigation for the Commission to be asked to stay proceedings in order to permit the adjudication of the case on a new theory, and this would be our position had the request come from the attorney of record for the plaintiff [old counsel] since the law of the case has long been established. 40 Ind. Cl. Comm. 305, 308–09.

The parties have embellished this stark proposition with citations as to the law of the case prevailing over the policy of new counsel, etc. We prefer to adopt it as our own without such embellishment, and hereby do. At the very least that can be said for it, it does not reveal an abuse of discretion.

We think that when the defendant announces by statute or regulation a procedure for presenting and deciding claims against it of some particular kind, and when a claimant files a petition in the manner and form prescribed, that is the procedure to be followed. The implied obligation of the claimant is to state his claim and stick to his statement, and to prosecute his claim diligently to adjudication, so that it can be paid and the government relieved of the threat of it as a thunder cloud in the sky. The correlative obligation of the defendant is to accord due process, to make its defense diligently though fairly, and to pay whatever award the required procedure produces. The diligent prosecution of a claim implies the dealing with it on a straight forward basis. The abandonment of an entire claim at any point with prejudice may well be a claimant's right, but the partial and contingent abandonment of it, after 25 years, without prejudice, when the goal of final

adjudication is in sight cannot be. That is in essence what the Indians would do here.

Plaintiff says defendant is not harmed by the proposed partial and contingent abandonment, because the award does not bear interest, but defendant is the best judge of its own welfare and it is here urging us to affirm the Commission. The Temoaks were under a duty to defendant to discover and announce their claim to own the 12 million acres adjudged to have been taken, perhaps not before they filed the petition, but surely before 1976. There can be no doubt that Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all. It may have even been so optimistic as to hope to have this accomplished in the lifetimes of persons then living. It provided in Section 22 that payment of a claim as assessed under the Act would discharge not only the specific claim made, but all claims and demands touching any of the matters involved in the controversy. The object was not pecuniary, in the short-term sense, so the saving or incurring of interest is not the major matter. Congress had long-term political objects, in the non-pejorative sense of the word "political," that are frustrated by continued delay in adjudication of claims.

Moreover, there is a third party to the controversy, whose interests litigants often neglect, the tribunal itself, the Indian Claims Commission at the time of the order appealed from, now ourselves as its successor. As Chief Justice Burger has said:

> We can no longer indulge in the old notion that it is "up to the lawyers to push cases." *Once a case is filed it is public business as well as private.* It is up to judges to see to it that dilatory tactics by neither party can frustrate speedy justice. [Emphasis supplied.] [Press Release by Supreme Court Public Information Office, December 21, 1978.]

We think, if this case had been sidetracked in the manner proposed, it would have been contrary to the statutory procedure under which the suit was brought, the intent and purpose of the Act, and the duty of the federal

judicial system to employ its resources economically as well as to achieve the ends of justice speedily. If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress as recommended in *Western Shoshone*, 209 Ct. Cl. at 59, n. 16, 531 F.2d at 503. If Congress wishes to alter or undo the normal course of Indian Claims Commission adjudication, it knows how to do it. *Cf.* Act of March 13, 1978, Pub. L. No. 95–243, 92 Stat. 153. The matter is somewhat changed since the *Western Shoshone* footnote because Congress can no longer stop the payment and defer the extinguishment of the title claim, just by not appropriating. By recent enactments, Act of March 7, 1978, Pub. L. No. 95–240, 92 Stat. 107, 116 and Act of May 4, 1977, Pub. L. No. 95–26, 91 Stat. 61, 96, Congress has amended the old standing appropriation to pay Court of Claims judgments, 31 U.S.C. § 724a, to make it available for Indian Claims Commission judgments, and to remove the old $100,000 limitation, there being now no upper limit on the amount of the judgment that can be paid. Thus it looks as if the Temoaks would have to get Congress to act affirmatively. In view of its plenary power over Indian tribal property, as spelled out in *Turtle Mountin Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 444, 490 F.2d 935, 945 (1974), we have no doubt that even after payment its action could be effective. And we think it is only Congress that could stay and undo the course of litigation at this late date, and if anybody should, it is only Congress. The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court. We do not mean to intimate a view whether or not new legislation should be enacted.

II

The cross-appeal is against the award by the Indian Claims Commission of $4,604,600 for removal of minerals from the Nevada portion of plaintiff's aboriginal lands before July 1, 1872, the stipulated valuation date. The Commission found it could not definitely set the valuation date, whereupon the parties stipulated that as to the

Nevada portion it was July 1, 1872. The Commission awarded $21,550,000 as the fair market value on the valuation date, of which $200,000 was for the California portion and the rest for the Nevada portion, not in contention in this appeal. The $4,604,600 was in addition, and supposedly the minerals removed, being no longer in place on the valuation date, did not constitute part of the then value.

The Commission considered that its decision was controlled by *United States* v. *Goshute Tribe*, 206 Ct. Cl. 401, 512 F.2d 1398 (1975). As defendant says, that is the only case where this court has sustained an award for removal of minerals before a found taking date. The facts of that case and this are indistinguishable. By almost identical and contemporaneous treaty provisions, there the Goshutes, Treaty of Tuilla Valley, 13 Stat. 681, here the Western Shoshone, Treaty of Ruby Valley, 18 Stat. 689, both in 1863, agreed with the same commissioners that the countries of the respective tribes might be explored and prospected for gold and silver, or other minerals, that mines when discovered might be worked, mining and agricultural settlements formed, and ranches established; that mills might be erected and timber taken for their use, as also for building. In recognition of the inconvenience to be anticipated to the respective tribes, including loss of game, the United States agreed to pay the Goshutes $1,000 per annum for twenty years, the Western Shoshone $5,000 per annum in such articles, including cattle, as the President might determine. Defendant does not distinguish the cases by the small differences in the treaty provisions.

In both instances, large amounts of valuable ores were mined and removed between the treaty dates and the found or agreed dates of valuation, or in other words, of full title extinguishment. In *Goshute*, we took the view, as the Commission did, that the tender of such a one-sided treaty for adhesion, in 1863, to ignorant and unlettered Indians, was unfair and dishonorable, generating a right to recovery under clause 5 of section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a, "claims based upon fair and honorable dealings that are not recognized by any existing

rule of law or equity." The Commission found, then and here, that a royalty of 20 percent of the value of the minerals removed up to the taking date, less the consideration paid, would be fair compensation. We agreed then, as we do here, that a valid claim under "fair and honorable dealings" was presented and the mode of rectifying it was proper. In this connection, we may further observe that law and equity, before 1946, did not afford a judicial remedy for the overreaching of an Indian tribe by an unfair treaty such as we have here. *United States* v. *Choctaw and Chickasaw Nations*, 179 U.S. 494 (1900). It was considered a "political" matter, entirely in the hands of the "political" i.e., the executive and legislative, authorities.

We further took the view that the treaty language did not confer on the United States or the miners any ownership of the minerals in the ground, only a license to remove whatever they did remove. So here also.

The taking award in both cases is founded on clause 4 of section 2, "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant * * *." The right to recover a 20 percent royalty under clause 5 is deemed terminated as of the taking date, and instead the minerals remaining in the ground are considered and valued as part of the entire fee. Such is the Commission's theory of both cases approved and adopted by us in our *Goshute* decision. We note that the value of the minerals in the ground on the taking date was found to be $12,500,000, while townsites were $900,000, farming land $1,500,000, good grazing land $3,750,000, fair to poor grazing land $2,700,000, all for the Nevada portion, making the total award for that portion $21,350,000, as stated above. Thus minerals were the predominant element.

Defendant makes much of the alleged distinction that in *Goshute* the Commission found the taking date, January 1, 1875, whereas here it was a matter of stipulation that the "valuation date" should be July 1, 1872. 29 Ind. Cl. Comm.

5, 7. Defendant says there was no stipulation as to the taking date.

Despite the similarity of the *Goshute* facts, defendant wants to make the controlling precedent here not *Goshute*, but *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 490 F.2d 954 (1974). In that case there was no treaty, no "fair and honorable dealing" claim based on an unfair treaty. We held that the Northern Paiutes, having previously been awarded a substantial sum for the value of their aboriginal Nevada lands on an average or composite taking date, December 31, 1862, could not also recover "trespass damages" for failure of the United States to protect the tribal lands from ravages by miners before that date. The explanation was in part a serious doubt whether the United States was not being compelled to pay for the same thing twice. In the earlier case, 183 Ct. Cl. 321, 393 F.2d 786 (1968), the damage done by the miners before the taking date, and the value added by their improvements, had both alike been ignored, in a sort of washout. The value assigned to the mineral property on the taking date was based on speculative purchases and sales of mineral property, and there was nothing to show it was abated a single dollar because of prior removal of minerals. On the technical side, we took the view that the United States having ratified and confirmed the miners' acts, they became acts of the United States, and takings. The found taking date having been an average or composite one, nothing having been found to have happened on the chosen date, it was not inconsistent with an earlier taking date for the mining claims actually staked before December 31, 1862. In fact, in stipulating use of that date for valuation, the parties expressly reserved the right to question any order the Commission might issue concerning taking dates. Thus our view was that the prior proceeding had adjudicated the liability of the United States for all takings, including those by miners which it had ratified and adopted. We left open the possible further liability for "trespass damages" in case of any ravages by miners not so ratified and adopted by the government, but we have not been informed whether that possibility was pursued.

The theory of the second *Northern Paiute* case thus was that against that tribe there was only one wrong, a taking, though one spread out in time, compensable under only one clause of the Act, clause 4, section 2, and that the attempt by the Commission to generate out of it two proceedings and two awards, was error. In *Goshute*, on the contrary, there were two wrongs, the unfair treaty of 1863 and the taking of 1875. They were compensable under two different clauses, 5 and 4, and compensation was assessed separately but simultaneously in one proceeding, a prudent joinder which gave good assurance against double compensation for the same thing. In both cases we rejected the Commission's "trespass damages" theory. The view put forward in *Northern Paiute* of imputing the miners' staking of claims to the United States, making the United States a taker pro tanto, could not apply in *Goshute*. As we then pointed out, the miners entered under the license the Indians had granted in the 1863 treaty, and not adversely to the Indians, and, therefore, their entries effected no takings. Conversely, as we also held, they acquired no title to minerals in the ground, and thus their entries could in no way have anticipated or forestalled the 1875 taking stipulated as the valuation date. That the 1875 date in *Goshute* was just as much a composite, average, or jury verdict date as the one in *Northern Paiute* is obvious, but the point was that the composite could not have included, as one of its elements, takings by miners, imputed to defendant. In *Goshute*, the Indians received royalties for pre-taking removal of minerals by way of reformation of an unfair treaty, but in *Northern Paiute*, no such view of the matter was possible.

The question of supplemental "trespass damages" came up again in *United States* v. *Fort Sill Apache Tribe*, 209 Ct. Cl. 433, 533 F.2d 531 (1976). In that case there was likewise no previous unfair treaty, so the *Goshute* rationale did not apply. The findings of the Commission were such as to rule out the theory of imputing to the United States takings by miners in staking their claims. We held there was no theoretical obstacle to holding the United States liable, under clause 5, for dishonorable failure to bar trespassers

from extracting minerals, but in such a case the United States should receive credit for whatever the trespassers did that enhanced the value of the land before the taking, and thus the taking award itself. The "trespass damages" a divided court held should net the value-destructive and value-enhancing activities of the trespassers' activities in their totality. Fair and honorable dealings required no more.

It will be obvious, we think, that whether a magic date is called a taking date or valuation date, and whether it is found by the Commission or stipulated is irrelevant in deciding whether to follow *Goshute*. What sets *Goshute* apart is that there are two kinds of wrongs, not one, with entirely different impacts on the fortunes of the Indians, and compensable under different clauses of the Act.

As we indicated in *Goshute*, 206 Ct. Cl. at 411, 512 F.2d at 1403, the absence of any allowance of credit to the United States for whatever it or the miners might have done to enhance the taking date value, before the taking, was troublesome. We noted, however, the nonuse in the award of speculative values that the miners might have created, the absence of any contention by defendant that the taking award was enhanced by such causes, and the predominance of actual or estimated quantities of minerals in both the pre-taking and taking portions. We cannot insist on perfect awards. The case would be different if defendant had made offers of proof before the Commission to show that the miners' presence and activities in the area, or those of others, made possible by the treaty, did enhance the value and affect the amounts awardable for the taking. As things are, we can only guess that such an effect occurred. On the other hand, the Commission might have held that in correcting an unfair treaty it should consider what was known on the treaty date, to make a corrected treaty that fair-minded treaty commissioners and knowledgeable Indians would have thought proper then. It might be thought unlikely that such negotiators would have speculated about future rises in land value and future takings. In this regard, the *Goshute* case, with an unfair treaty to correct, is also distinguishable from *Northern*

Paiute and *Fort Sill Apache*, where there was none. The 20 percent royalty, unadjusted, as proposed by the Commission in all three cases, clearly has a better theoretical foundation in the unfair treaty case.

At any rate, though we think *Goshute* was rightly decided, whether right or wrong it is an all-fours precedent here that could be overruled only by the full court en banc. The case cannot be distinguished from *Goshute* in any feature that is relevant.

Accordingly, the plaintiff's appeal is overruled, the defendant's cross-appeal is overruled, and the judgment of the Commission is

Affirmed.

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

Appeal No. 1-78

[Filed: June 1, 1979]

THE TEMOAK BAND OF WESTERN SHOSHONE INDIANS, NEVADA,

Appellant,

v.

THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN INDIANS, NEVADA,

Appellees.

Reid Peyton Chambers, attorney of record for appellant. *Sonosky, Chambers & Sachse*, and *Marvin J. Sonosky*, of counsel.

Donald Milure, with whom was *Assistant Attorney General James W. Moorman*, for appellee United States.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges.*

ORDER

This case comes before the court on its own motion for further consideration and action on appellant's motion for rehearing with reference to the order entered herein on April 3, 1979, which, among other things, provided for completion of the court's action on the said motion for rehearing on or about May 15, 1979. Upon consideration thereof, without oral argument, the period of extended stay to May 15, 1979, having expired with no further supplemental stipulation, motions, briefs or filings by the parties,

IT IS ORDERED that appellant's said motion for rehearing, filed March 7, 1979, be and the same is denied.

BY THE COURT

/s/ Daniel M. Friedman
Chief Judge

APPENDIX C

40 Ind. Cl. Comm. 318 453

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FINAL AWARD

UPON CONSIDERATION of the findings and opinion entered herein today which are incorporated and made a part hereof, and of the entire record in this case, the Commission concludes as a matter of law that the plaintiffs are entitled to recover from the defendant for and on behalf of the Western Shoshone Identifiable Group the sum of $26,145,189.89.

IT IS HEREBY ORDERED that as a final award in full satisfaction of all claims against the defendant in Docket 326-K, the plaintiffs have and recover from the defendant for and on behalf of the Western Shoshone Identifiable Group the sum of $26,145,189.89.

Dated at Washington, D.C., this 15th day of August 1977.

/s/ Jerome K. Kuykendall, Chairman

/s/ John T. Vance, Commissioner

/s/ Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

APPENDIX D

40 Ind. Cl. Comm. 305

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTIONS TO STAY PROCEEDINGS FOR OTHER PURPOSES

On November 15, 1976, and January 24, 1977, the Chairman of the Business Council of the Temoak Bands of Western Shoshone Indians filed motions to stay proceedings in Docket 326-K pursuant to resolutions of the Business Council of the Temoak Bands. On April 7, 1977, the Temoak Bands filed an amended motion for a stay of proceedings and supporting material through an attorney employed by their Business Council under a special contract of March 9, 1977, to represent the Temoak Bands before this Comission. The Temoak Bands, in their motions to stay proceedings,

reject the litigation plan followed by the plaintiff from the time the claim was filed. They request a stay pending an adminstrative determination by the Secretary of the Interior on their petition filed with the Secretary on February 22, 1977, asserting that the Western Shoshone Indians of Nevada own beneficial title to some or all of the lands described in Article V of the Treaty of October 1, 1863, of Ruby Valley, 18 Stat. 869.

The defendant responded on November 23, 1976, January 14, and 31, February 23, and April 19, 1977, opposing the motions to stay on the ground that the Commission has already ruled against assertions that the plaintiff owns the Indian title to the lands under consideration. On April 19, 1977, the defendant also filed a motion for an order dissmissing all of the plaintiff's claims before the Commission in subject docket if the Commission grants a stay of proceedings herein.

On November 29, 1979, the plaintiff's attorney of record moved that the Commission enter its findings on offsets and stay entry of final judgment until disposition of the motion to stay proceedings. In a response of December 8, 1976, the defendant opposed the request for stay of entry of final judgment. On February 28, 1977, the plaintiff's attorney of record replied to the first two motions to stay filed by the Temoak Bands and on April 19, 1977, replied to the amended motion to stay, requesting, by cross-motions, that the Commission issue its findings and conclusions on the offsets phase of this case and that the Commission request the Secretary of the Interior to assist in holding meetings of the Western Shoshones for the purpose of deciding on a course of action in this litigation. On April 28, 1977, the plaintiff's attorney of record filed a response in opposition to the defendant's motion to dismiss.

On April 27, 1977, the defendant responded to the cross-motions of the attorney of record for the plaintiff; on May 2, 1977, the Temoak Bands responded, opposing the defendant's motion to dismiss, and replied to the responses of the defendant and to that of the attorney of record for the plaintiff to the amended motion for a stay. The response of May 2 also replied to the cross-motions of the plaintiff's attorney of record. On May 12, 1977, the attorney of record for the plaintiff responded to the Temoak Bands' reply to the cross-motions.

Oral argument on the above listed motions, responses, and supporting pleadings was held before the Commission on July 18, 1977.

Upon consideration of the foregoing pleadings, the supporting documents, and oral argument thereon, and being fully advised in the premises, the Commission concludes that:

(1) The Temoak Bands, organized under the Indian reorganization Act, 25 U.S.C. §461, and recognized by the Secretary of the Interior as having authority to maintain a suit, were held to have the capacity to maintain the Docket 326-K suit. *Shoshone Tribe of Indians v. United States,* 11 Ind. Cl. Comm. 387, 418 (1962). The Western Shoshone Identifiable Group, plaintiff herein, is made up of persons from at least four separate reservations, from a colony, and from non-reservation groups. The plaintiff has been represented before the Commission, since the filing of the Docket 326-K claim in 1951, by the Temoak Bands of Western Shoshones. The Temoak Bands claim authority, as exclusive representative of the plaintiff, under an irrevocable power of attorney, to request a stay in these proceedings in attempting to obtain part of the land included in the subject claim rather than money

compensation therefor. In filing the motions to stay, the Business Council of the Temoak Bands has reversed its former position of pursuing the claim herein under the Indian Claims Commission Act for money compensation and, by requesting the stay, has adopted the position of the Western Shoshone Legal Defense and Education Association. The requests by that Association for a stay of proceedings and to present an amended claim herein were denied by the Commission, which denial was affirmed by the Court of Claims. 35 Ind. Cl. Comm. 457 (1975), *aff'd, Western Shoshone Legal Defense and Education Association v. United States,* 209 Ct. Cl. 43 (1976), *cert. denied* 429 U.S. 885 (1976).

(2) Two tribes, the Yomba Shoshones and the Duckwater Shoshones, with members belonging to the plaintiff Identifiable Group challenge the assertion that the Temoak Bands are the exclusive representative of the plaintiff. The Court of Claims has held that the exclusive right of representation granted in Section 10 of the Indian Claims Commission Act for tribal organizations recognized by the Secretary of the Interior extends only to representation of its own members (*Turtle Mountain Band of Chippewa Indians v. United States,* 203 Ct. Cl. 426, 454-459 (1974); *cf. Western Shoshone Legal Defense and Education Association, supra,* at 60-61 and note 18 on this point.)

(3) Assuming, without deciding, that the Temoak Bands are the exclusive representatives of the Western Bands of the Shoshone Tribe of Indians under an irrevocable power of attorney, we are of the opinion that it is too late in the litigation of the Commission to be asked stay proceedings in order to permit adjudication of the case on a new theory, and this would be our position had the request come from the attorney of record for the

plaintiff, since the law of the case has long been established. *Western Shoshone Legal Defense and Education Association, supra.*

(4) The cross-motion of the attorney of record for the plaintiff that the Commisision enter its findings and conclusions on offsets and his motion that the Commission stay entry of final judgment until disposition of the motion to stay proceedings will be dismissed as the Commission's action on offsets in subject docket and on the motions to stay proceedings is being taken today. The cross-motion of the plaintiff's attorney of record that the Commission request the Secretary of the Interior to assist in arranging meetings of the Western Shoshones for the purpose of deciding on a course of action in this litigation will be denied as inapposite in view of our conclusion that the motions to stay should be denied.

(5) The defendant's motion that the Commission dismiss all the claims of the Western Shoshone Identifiable Group in Docket 326-K in the event that the Commission does not deny the Temoak Bands' motions to stay will be dismissed since the Commission concludes that the motions to stay should be denied.

IT IS HEREBY ORDERED that the motions of November 15, 1976, and January 24, 1977, and the amended motion of April 7, 1977, by the Temoak Bands of Western Shoshone Indians of Nevada for a stay of proceedings in Docket 326-K be denied. IT IS FURTHER ORDERED that the cross-motion of the plaintiff's attorney of record as to the Commission's findings and conclusions on offsets be dismissed, that his motion to stay entry of final judgment be dismissed, and that the cross-motion regarding a request that the Secretary of the Interior assist in arranging meetings of the Western Shoshones in order to decide action to be taken in

this litigation be denied. IT IS ORDERED ALSO that the defendant's motion that the Commission dismiss the plaintiff's claims in this docket if the motions to stay by the Temoak Bands are not denied is dismissed.

Dated at Washington, D.C. this *15th* day of August 1977.

/s/ Jerome K. Kuykendall, Chairman

/s/ John T. Vance, Commissioner

/s/ Richard W. Yarborough, Commissioner

/s/ Margret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

APPENDIX E

11 Ind. Cl. Comm. 387 34/

BEFORE THE INDIAN CLAIMS COMMISSION

SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION, WYOMING, *et al.*, *Petitioners,* *v.* THE UNITED STATES OF AMERICA, *Defendant.*	Docket No. 326
SHOSHONE NATION OR TRIBE OF INDIANS on the relation of and represented by EDWARD QUEEP BOYER, *et al.*, *Petitioner,* *v.* THE UNITED STATES OF AMERICA, *Defendant.*	Docket No. 367

Decided: October 16, 1962

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Petitioners in Docket No. 326 are the Shoshone Tribe of Indians of the Wind River Reservation, Wyoming, suing as representatives of the Eastern Bands of Sho-

shonee Indians; the Northwestern Bands of Shoshone Indians; the Shoshone-Bannock Tribes of Fort Hall Reservation, Idaho, suing on behalf of the Northwestern Bands of Shoshonee and on behalf of the Mixed Bands of Bannacks and Shoshonee Indians and on behalf of the Bannack Tribe; Te-moak Band of Western Shoshone Indians, Nevada, suing on behalf of the Western Bands of the Shoshonee Nation of Indians; Confederated Tribes of the Goshute Reservation, suing on behalf of the Shoshonee-Goship Bands of Indians, and Little-Moon, an individual member of the Shoshonee-Goship Bands, suing on behalf of and on relation of the Shoshonee-Goship Bands of Indians. Each of these groups sues also on behalf of the Shoshone Nation or Tribe of Indians. All of the petitioners, with the exception of the Shoshone Indians of the Wind River Reservation, Wyoming, and Northwestern Bands of Shoshone Indians and the individual petitioner, Little-Moon, are organized under the Indian Reorganization Act of 1934 (48 Stat. 984) and are recognized by the Secretary of the Interior as having authority to maintain a suit. Petitioner, Shoshone Indians of the Wind River Reservation, Wyoming, is, however, an organization, which although not under the Indian Reorganization Act, recognized by the Secretary of the Interior as having authority to maintain this suit. Petitioners in Docket No. 367 are the Shoshone Nation or Tribe of Indians, on relation of and represented by three named individuals said to be members of the Shoshone Nation or Tribe of Indians. The so-called Shoshone Nation or Tribe of Indians maintains no organization. The organized tribes or groups above-mentiond have the capacity to maintain this suit.

* * *

23. The Commission finds, based upon the findings of fact herein made and the record as a whole, that the Western Shoshone identifiable group aboriginally exclusively used and occupied the following territory:

> Commencing at Brown, California, thence north to the northernmost point of the Upper Haiwee Reservoir; thence in a northeastwardly direction to a point about four miles east of the town of Keeler, California; thence north to the crest of the Inyo Mountains and continuing northerly along the crest of said Inyo Mountains to a point at 36° 50′ N latitude, 118° 00′ W longitude; thence northeastwardly to a point on the California-Nevada State line due south of Lida, Nevada; thence north to the town of Lida, Nevada; thence westwardly to the crest of the Silver Peak mountains and continuing along said crest northwestwardly to a point at 37° 45′ N latitude, 117° 50′ W longitude (due west of Silverpeak); thence north to the crest of the Shoshone Mountains and continuing along said crest to North Shoshone Peak; thence north to Antler Peak on Battle Mountain, thence northeastward to Mountain City, Nevada; thence southeastwardly to the crest of the Pequod Mountains and continuing along said crest to Spruce Mountain; thence to the crest of the Cherry Creek Mountains and then south along said crest to the Egan Range; thence south along the crest of the Egan Range to a point just west of the town of Kimberly, Nevada; thence west to the crest of the White Pine Mountains in the vicinity of Mount Hamilton; thence south along the crest of the White Pine Mountains to Duckwater Mountain; thence south to Troy Peak; thence southwest along the crest of the Quinn Canyon Range to 37° 45′ N latitude and 116° W longitude; thence south to 37° 15′ N latitude and 116° W longitude; thence south to the town of Carrara, Nevada; thence southwest to

Maturanga Peak (southeast of Darwin, California); thence south along the crest of the Argus Range to Argus Peak; thence west to the place of beginning at Brown, California.

* * *

26. The Commission further finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Findings 22 and 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States. The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.

APPENDIX F

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and

the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established

whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Sho-shonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and

mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Sow-er-e-gah, his x mark.
Po-on-go-sah, his x mark.
Par-a-woat-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.
Buck, his x mark.

Witnesses:

J. B. Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T. Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

APPENDIX G

The Act of August 13, 1946, ch. 959, Section 22, 60 Stat. 1055, 25 U.S.C. 70u, reads in full:

§ 70u. Effect of final determination of Commission

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act [25 USCS §§ 70 and notes-70n, 70o-70v-1], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act [25 USCS §§ 70 and notes-70n, 70o-70v-1] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

APPENDIX H

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 30, 1979

Reid P. Chambers, Esquire
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Chambers:

Thank you for your letter of November 16, 1978, concerning the Western Shoshone petition.

As you know, our Office has reviewed this problem in great detail, as has the Assistant Secretary for Indian Affairs. I have concluded that this problem may best be addressed as a policy question—determining and meeting the needs of the Western Shoshone for land—rather than strictly as a legal issue.

After our extensive review of this matter, Assistant Secretary for Indian Affairs Gerard and I have recommended that the Secretary establish a Departmental task force to investigate the conditions of the Western Shoshone in Nevada. If it appears from the investigation that the creation of reservations is needed, the task force will undertake to identify lands which would be suitable for that purpose.

The task force will include participation by this Office and will fully involve the Western Shoshone. Throughout the course of our investigation, we will also consult

closely with the congressional delegation from Nevada. I expect that this action will contribute to a speedy resolution of the issues presented in the Western Shoshone petition and may also be a means by which pending litigation may be resolved.

Sincerely,

/s/ Leo Krulitz
Solicitor

APPENDIX I

IN THE
UNITED STATES COURT OF CLAIMS

App. No. 1-78

[April 3, 1979]

THE TEMOAK BAND OF WESTERN SHOSHONE INDIANS, NEVADA,

Appellant,

v.

THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN INDIANS, NEVADA,

Appellees.

PRACTICE AND PROCEDURES: WITHDRAWAL OF CASES FROM SUBMISSION; PAYMENT; TIME OF.

Reid Peyton Chambers, attorney of record for appellant. *Sonosky, Chambers & Sachse,* and *Marvin J. Sonosky,* of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman,* for appellee United States.

*

---

*No brief was filed by counsel for the Temoak Band of Western Shoshone Indians, Nevada, with regard to the motion for rehearing.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges*.

ORDER

This case is before the court on the appellant's motion for rehearing. The court, on the joint request of both parties, grants a stay of proceedings until May 15, 1979, subject to conditions. Action on appellant's other and further requests is deferred until May 15, 1979. The practical effect of this order is that the clerk will not certify our judgment to the Treasury until after the stay expires, and consequently, whatever effect "payment" has in extinguishing Indian title to land will until then not occur. See Part I of our opinion of February 21, 1979, final paragraph.

We heard oral argument on the appeals of both parties on November 28, 1978. Thereafter, the case was in the hands of the court, under submission. At that time appellee United States was strongly opposed to further delay, and no suggestion was offered that any stay for settlement negotiations was desired, at least, none by defendant. On December 4, 1978, the court met in its so-called assignment conference, a decision was tentatively agreed upon, and the writing of an opinion assigned. The opinion was written and circulated, and voted approval at a decisions conference of January 29, 1979. The court secretary thereupon sent it to the printer. On February 15, 1979, the slip opinion was back from the printer and being held for the regular monthly announcement date. Up to that date nothing had been heard of any change in the United State's position and the opinion as issued February 21 necessarily reflected what the court knew of appellee's position up to January

29. Appellant's attack on our opinion for misstating appellee's position comes with bad grace in such circumstances. Of course, we also know appellant and appellee had had twenty-eight years, more or less, to discuss settlement.

The joint motion filed February 15, 1979, apparently was intended and understood by the parties to withdraw the case at least temporarily from submission to the court. We must strongly reject the alleged right of parties to withdraw cases from submission for settlement negotiations, except in extraordinary circumstances not here present. When parties join in submitting a case, whatever else they differ on, they agree that the next order of business is for the court to make its decision; and the sooner it makes it, the better. Settlement can come earlier or later. Any interruption of this process makes a mockery of the orderly and expeditious conduct of court business. The motion of February 15, 1979, was denied for good and sufficient grounds.

Now the court has stated its decision and it is subject to the usual right of the parties to move for rehearing or to apply to the Supreme Court for certiorari. Appellant has moved for rehearing, and both parties have again requested a stay. As a matter of fact, even without a stay, the clerk could not forward the judgment certificate to the Treasury while the motion for rehearing was pending unacted on, and the legal effect, whatever it may be, of payment, could not occur.

The parties are granted a stay of further proceedings until May 15, 1979, but in light of the apparent nonuse of settlement negotiation opportunities over the last twenty-eight years, it is on strict conditions to assure that there will be no further delay. The stay will not be extended after May 15, 1979, and the present judgment

of the court will not be modified pursuant to any agreement or stipulation which requires any further fact finding by this court or which affects the rights of third parties. Possibly a simple stipulation to reduce the amount of land affected by the judgment and the dollar amount of the award, would be feasible. We agree with appellant that this stay is its last clear chance to undo by agreement, in whole or in part, its former moves to exchange lands for money by asserting appellee had taken the lands, and we continue to believe appellant's new expectations can best now be dealt with by congressional action, especially if they raise such complex issues as we fear. Any further stay after May 15 would mock the congressional expectation or hope as it was in 1946, that Indian Claims Commission proceedings would some day finally adjudicate claims based on ancient wrongs against Indians. On or about May 15, 1979, the court will complete its action on appellant's motion for a rehearing and terminate its responsibility concerning the instant claim.

IT IS SO ORDERED.

BY THE COURT

/s/ Daniel M. Friedman
Chief Judge

April 3, 1979

APPENDIX J

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

June 27, 1979

Reid Peyton Chambers, Esquire
Sonosky, Chambers & Sachse
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Chambers:

We have reviewed the February 22, 1977, petition and December 7, 1977, supplementary memorandum of the Western Shoshone concerning restoration of lands within their aboriginal territory in Nevada. The prospect of administrative alternatives which could be used not only to evaluate the Shoshone claim, but also to settle pending litigation with the United States involving the same lands, led us to recommend that the Justice Department seek a stay of proceedings in the Court of Claims. The court granted a stay until May 15, 1979, and in the interim we completed our review of the matter.

We have decided not to undertake a program for establishing additional reservation lands at this time, and will not take any further initiatives to settle the litigation. At this stage in the claims case, it appears not to be in the best interest of the Western Shoshone to delay its conclusion any longer.

Sincerely,

/s/ Cecil D. Andrus
Secretary

Supreme Court, U. S.
FILED
NOV 3 1979
MICHAEL RODAK, JR., CLERK

No. 79-340

In the Supreme Court of the United States

OCTOBER TERM, 1979

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L. KLARQUIST
DEAN K. DUNSMORE
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Statement 2

Argument 8

Conclusion 17

CITATIONS

Cases:

Aberdeen & Rockfish R.R. v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207 9

City of Mishawaka, Ind. v. *Indiana & Michigan Electric Co.*, 560 F. 2d 1314 9

Dellinger v. *Mitchell*, 442 F. 2d 782 9

Ferguson v. *Tabah*, 288 F. 2d 665 9

Filtrol Corp v. *Kelleher*, 467 F. 2d 242, cert. denied, 409 U.S. 1110 9

Landis v. *North American Co.*, 299 U.S. 248 9

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335 ..... 12, 15

Pet Milk Co. v. *Ritter*, 323 F. 2d 586 9

Shoshone Tribe v. *United States*, 11 Ind. Cl. Comm. 387 ..... 3, 14-15, 16

Taunton Gardens Co. v. *Hills*, 557 F. 2d 877 9

Page

Cases—(Continued):

Tee-Hit-Ton Indians v. *United States*, 348 U.S. 272 12

Thompson v. *Boyle*, 417 F. 2d 1041, cert. denied, 397 U.S. 972 9

Tlingit & Haida Indians of Alaska v. *United States*, 177 F. Supp. 452 14

United States v. *Dann*, 572 F. 2d 222 ..... 5, 9, 16

United States v. *Gemmill*, 535 F. 2d 1145 14

United States v. *Georgia Pacific Corp.*, 562 F. 2d 294 9

United States v. *Mellon Bank, N.A.*, 545 F. 2d 869 9

United States v. *Midwest Oil Co.*, 236 U.S. 459 14

United States v. *Pueblo of San Ildefonso*, 513 F. 2d 1383 14

Western Shoshone Identifiable Group v. *United States*, 29 Ind. Cl. Comm. 5 3-4

Western Shoshone Identifiable Group v. *United States*, 35 Ind. Cl. Comm. 457, aff'd *sub nom. Western Shoshone Legal Defense and Education Association* v. *United States*, 531 F. 2d 495, cert. denied, 429 U.S. 885 ..... 4, 5-6, 10, 16

Page

Cases (Continued):

Western Shoshone Identifiable Group v. *United States*, 40 Ind. Cl. Comm. 305 7

Western Shoshone Identifiable Group v. *United States*, 40 Ind. Cl. Comm. 318 7

Treaty and statutes:

Treaty of Ruby Valley, 18 Stat. 689:

Article IV 12

Article V 6, 12

Indian Claims Commission Act, 25 U.S.C. 70 *et seq.* :

25 U.S.C. 70a 4

25 U.S.C. 70u 16

Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* 15

Taylor Grazing Act, 43 U.S.C. 315 *et seq.* 15

Miscellaneous:

Restatement (Second) of Conflict Laws (1971) 16

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-14a) is reported at 593 F. 2d 994. A subsequent order of the Court of Claims filed on April 3, 1979 (Pet. App. 37a-40a) granting a stay of proceedings until May 15, 1979, and an order of June 1, 1979, denying petitioner's motion for rehearing (Pet. App. 15a-16a) are not yet reported. The final award of the Indian Claims Commission (Pet. App. 17a-18a) and order denying petitioner's motion to stay proceedings (Pet. App. 19a-24a), both filed on August 15, 1977, are reported at 40 Ind. Cl. Comm. 318, 453, and 40 Ind. Cl. Comm. 305, respectively.

JURISDICTION

The order of the Court of Claims denying petitioner's timely motion for rehearing was entered on June 1, 1979. The petition for a writ of certiorari was filed on August 30, 1979. The jurisdiction of this Court is invoked under 25 U.S.C. 70s(c) and 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Indian Claims Commission erred in denying petitioner's motion to stay proceedings, made immediately prior to the entry of final judgment and more than 25 years after this action was filed, to permit petitioner to assert in another forum that it retained aboriginal title to some 12 million acres of public land in Nevada, a title which petitioner had consistently argued, and the Indian Claims Commission had previously held, had been extinguished.

STATEMENT

This action originated on August 10, 1951, with the filing before the Indian Claims Commission of a petition alleging a claim for the taking or extinguishment of title to lands on behalf of the entire Shoshone Nation in the States of California, Nevada, Idaho, Utah, Wyoming, and Colorado. In the alternative, separate claims were alleged on behalf of the constituent bands or groups of the Shoshone Nation, one of which was petitioner herein, the Western Shoshone Identifiable Group, as represented by the Te-Moak Bands of Western Shoshone Indians.

Following trial and briefing on the land title issues,[1] the Indian Claims Commission entered an opinion, findings

---

[1]Before the Indian Claims Commission, it was the practice to hear cases in three separate trials, one on title, one on valuation, and one on set-offs claimed by the United States.

of fact, and an interlocutory order on October 16, 1962, in which the Commission found that the Western Shoshone Indians held aboriginal title to 24,396,403 acres of land in the present States of California and Nevada. *Shoshone Tribe* v. *United States*, 11 Ind. Cl. Comm. 387, 413-414 (1962).[2] The Commission found that title to the lands in California was extinguished on March 3, 1853. *Id.* at 415. With respect to the Nevada lands, the Commission found that aboriginal title had been extinguished over a period of years through gradual encroachment by whites and the acquisition, disposition, or taking of the Shoshone lands by the United States for its own use and benefit. Because it could not then identify a precise date for these actions, the Commission reserved the question of the dates of extinguishment in Nevada for further proceedings. *Id.* at 416. In order to avoid complex litigation covering the date of extinguishment of aboriginal title for many different parcels, petitioner and the United States subsequently stipulated to an average date of valuation of July 1, 1872, for all lands in Nevada, and the Commission approved that stipulation in 1966. See *Western Shoshone Identifiable Group* v. *United States*, 29 Ind. Cl. Comm. 5, 7 (1972).

In September 1967, the parties proceeded to trial on the value of the Western Shoshone lands at the time of extinguishment of aboriginal title. In 1972 the Commis-

---

[2]The Commission chose to consider the claims of the constituent bands or groups of the Shoshone Nation individually, and found that the Western Shoshone constituted a separate indentifiable group for purposes of presenting a claim against the United States. 11 Ind. Cl. Comm. at 421-446. Of the total land to which petitioner once held aboriginal title, 2,184,650 acres were located in California, and 22,211,753 were in Nevada. See *Western Shoshone Identifiable Group* v. *United States*, 29 Ind. Cl. Comm. 5, 6, 63 (1972).

sion entered an opinion, findings of fact, and an interlocutory order establishing the value of plaintiff's lands at $21,550,000. 29 Ind. Cl. Comm. at 125.[3] In October 1973, the parties proceeded to trial before the Commission on the issues raised by set-offs claimed by the United States pursuant to 25 U.S.C. 70a.

In April 1974, while the parties were awaiting a decision on the set-off claims and entry by the Commission of a final award, a group identified as the Western Shoshone Legal Defense and Education Association and Frank Temoke (hereinafter the Association) sought to intervene. The Association claimed that the Western Shoshone aboriginal title had not been extinguished with respect to approximately 12 million acres of the land already valued as lost to the Western Shoshone. The Association sought to present an amended claim, deleting any request for an award for the acres to which it asserted aboriginal title had not been extinguished,[4] and also sought to stay proceedings pending a decision in *United States* v. *Dann*, Civil No. R-74-60 BRT (D. Nev.). In the *Dann* case,

[3]An additional award of $4,604,600 was entered for minerals removed prior to the valuation dates.

[4]The Association asserted that petitioner herein and its counsel acted collusively with the United States in stipulating to the date of extinguishment of aboriginal title for valuation purposes. However, the Indian Claims Commission noted that the United States had denied petitioner's allegations that it had aboriginal title to the lands in Nevada and that aboriginal title was taken by the United States, thereby putting the question of extinguishment in issue. The stipulation to a specific average date of extinguishment for purposes of valuation was viewed by the Commission as an entirely appropriate means by which the parties could avoid a trial on the actual date of extinguisment of aboriginal title for each parcel of land within the claims area. *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm. 457, 466-470 (1975).

which had been commenced on May 6, 1974, the United States sought damages in trespass against several Western Shoshone Indians for grazing stock without a permit under the Taylor Grazing Act, 43 U.S.C. 315, *et seq.*, on certain public lands within the 12 million acres at issue in the Association's motion to intervene. The *Dann* defendants defended on the grounds that the Western Shoshone title had not been extinguished.[5]

Petitioner and the United States opposed the Association's attempt to intervene and to stay proceedings, and the Indian Claims Commission dismissed the petition. The Commission concluded, *inter alia*, that the question of extinguishment of aboriginal title to the lands in Nevada had been presented to and decided by the Commission. *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm. 457, 465-471 (1975). On appeal to the Court of Claims, petitioner (and the United States) argued in support of the Commission's determinations, which were affirmed. *Western Shoshone Legal Defense and Education Association* v. *United States and Western Shoshone Identifiable Group*, 531 F. 2d 495

[5]The district court in *Dann* held for the United States on the ground that the decision by the Indian Claims Commission collaterally estopped the defendants from asserting that the Western Shoshone's aboriginal title had not been extinguished. The court of appeals reversed, holding that the decision by the Indian Claims Commission in the instant case did not collaterally estop the defendants because the judgment in the present case had not yet become final. The court of appeals also concluded that the defendants would not be estopped by a judgment in the present case because the question of extinguishment was not actually litigated by the Indian Claims Commission. The court therefore remanded to the district court for trial on the Western Shoshone's aboriginal title. *United States* v. *Dann*, 572 F. 2d 222 (9th Cir. 1978). The case is now under submission to the district court on cross motions for summary judgment (Pet. 16).

(1976). Both the United States and petitioner opposed the Association's petition for a writ of certiorari, and this Court denied the petition. 429 U.S. 885 (1976). Petitioner argued in its brief in opposition in this Court that the question of extinguishment had been put in issue in the earlier proceedings before the Indian Claims Commission and that the decision by the Commission and the Court of Claims that its aboriginal title had been extinguished was correct. Brief in Opposition for Respondent, The Western Shoshone Identifiable Group, 4-9 & n.14 (No. 76-90, Oct. Term 1976).

After all of the above proceedings, petitioner reversed the litigating position it had taken for over 25 years and filed motions with the Indian Claims Commission on November 15, 1976, and January 24, 1977, for a stay of proceedings[6] so that it might pursue other administrative or judicial remedies to claim that it still held aboriginal title to 12 million acres in the claims area.[7] In doing so petitioner in effect adopted the position of the Association it had only recently opposed. In February 1977, petitioner requested the President and the Secretary of the Interior to determine its title to national forest and public domain lands within the area described in Article V of the Treaty (Pet. 7).

---

[6]This position was taken through new counsel for petitioner pursuant to a special contract. Traditional counsel for petitioner continued to appear before the Indian Claims Commission and the Court of Claims, and neither tribunal felt it necessary to decide who properly represented petitioner.

[7]The approximately 12 million acres involved are the lands described in Article V of the Treaty of Ruby Valley (Pet. App. 31a) which are still in public ownership (Pet. 5). Petitioner concedes that its aboriginal title to the acreage in Nevada outside the area described in Article V of the Treaty and lands within that area that have passed into private ownership has been extinguished (*ibid.*). The 12 million acres are now national forests or public domain lands.

The United States opposed the motion for a stay in the present case, and on August 15, 1977, the Commission denied the motion. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm. 305 (1977). On the same day, the Commission entered a final award in the amount of $26,145,189.89. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm. 318, 453 (1977). Petitioner then appealed from the Commission's denial of the stay, but did not appeal the Commission's final judgment holding that its title to 12 million acres had been extinguished. The United States again opposed petitioner's request for a stay.[8]

After the case was taken under submission by the Court of Claims, petitioner and the United States jointly moved on February 15, 1979, for a brief stay in that court to provide a last opportunity for discussions about petitioner's claim that it retained aboriginal title to 12 million acres. The Court of Claims denied this joint motion insofar as it might have been intended to withdraw submission of the case to the court, and on February 21, the Court of Claims affirmed the Commission's denial of petitioner's request for a stay (Pet. App. 1a-6a). However, on April 3, the Court of Claims granted the joint motion for a stay of proceedings in that court to May 15, 1979, and withheld its decision on rehearing — and therefore the entry of final judgment—until after that date (Pet. App. 37a-40a). The Department of the Interior initially agreed during this time to study petitioner's claim with a view toward a possible recommendation that

---

[8]The United States also cross-appealed from the award of damages for minerals removed prior to the stipulated date of valuation of petitioner's title, July 1, 1872. The Court of Claims affirmed this award (Pet. App. 8a-14a).

Congress enact legislation establishing a reservation for petitioner. The Department subsequently decided not to make such a recommendation, and after the temporary stay to May 15 expired, the Court of Claims denied petitioner's request for rehearing (Pet. App. 15a-16a).

On June 27, the Secretary of the Interior formally notified petitioner that he had decided not to undertake a program to establish additional reservation lands for petitioner and that the Department would not undertake any further efforts ro settle the present litigation (Pet. App. 41a). On August 27, 1979 petitioner filed suit against the Secretary of the Interior and Secretary of Agriculture in the United States District Court for the District of Columbia to determine that petitioner retains aboriginal title to 12 million acres of public lands described in Article V of the Treaty of Ruby Valley (Pet. 9; *Te-Moak Bands of Western Shoshone Indians, Nevada* v. *Andrus, et al.* (Civ. No. 79-2229)).

On August 30, petitioner filed a petition for a writ of certiorari to review the decision of the Court of Claims affirming the Indian Claims Commission's denial of a stay.

ARGUMENT

Petitioner contends that the Indian Claims Commission erred in denying its motion for a stay. Petitioner correctly acknowledges (Pet. 15) that if the judgment of the Court of Claims becomes final, petitioner would be barred from asserting a claim against the United States that it retains aboriginal title to the 12 million acres in Nevada. 25 U.S.C. 70u; see Pet. App. 8a, 34a. Petitioner therefore seeks a stay pending the determination in another forum—presumally either in the action brought by the Te-

Moak Bands in the District of Columbia[9] or the trespass action brought by the United States in the District of Nevada, *United States* v. *Dann, supra*—that it still has aboriginal title to the lands in question.

1. The power to grant or deny a stay is within the discretion of a court. *Landis* v. *North American Co.*, 299 U.S. 248, 254-259 (1936). Appellate review of the propriety of the granting or denial of a stay of proceedings is limited to determining if the lower tribunal has abused its discretion. *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (Burger, Circuit Justice); *United States* v. *Georgia Pacific Corp.*, 562 F. 2d 294, 296-297 (4th Cir. 1977); *City fo Mishawaka, Ind.* v. *Indiana & Michigan Electric Co.*, 560 F. 2d 1314, 1324-1325 (7th Cir. 1977); *Taunton Gardens Co.* v. *Hills*, 557 F. 2d 877, 878-879 (1st Cir. 1977); *United States* v. *Mellon Bank, N.A.*, 545 F. 2d 869, 872-874 (3d Cir. 1976); *Filtrol Corp.* v. *Kelleher*, 467 F. 2d 242, 245 (9th Cir. 1972), cert. denied, 409 U.S. 1110 (1973); *Dellinger* v. *Mitchell*, 442 F. 2d 782, 786 (D.C. Cir. 1971); *Thompson* v. *Boyle*, 417 F. 2d 1041, 1042 (5th Cir. 1969), cert. denied, 397 U.S. 972 (1970); *Pet Milk Co.* v. *Ritter*, 323 F. 2d 586, 588 (10th Cir. 1963); *Ferguson* v. *Tabah*, 288 F. 2d 665, 672 (2d Cir. 1961). Because petitioner had for over 25 years taken the position that its title was extinguished, and because the stay was not requested until the very eve of entry of a

---

[9]Petitioner Western Shoshone Identifiable Group is comprised of a number of groups including the Te-Moak Bands, which were held by the Indian Claims Commission to be the exclusive representative of all Western Shoshone Indians before the Commission (Pet. 3 n.1). The Te-Moak Bands filed the action on August 27, 1979, in the District of Columbia as a representative of all Western Shoshone Indians in Nevada as well. Complaint para. 5, *Te-Moak Bands of Western Shoshone Indians, Nevada* v. *Andrus, et al.*, Civ. No. 79-2229 (D.D.C.).

final judgment, the Court of Claims properly found that the Commission had not abused its discretion when it denied the request for a stay. Similarly, the Court of Claims itself did not abuse its discretion in granting but a limited stay of proceedings until May 15, 1979.

2. Petitioner contends, however, that it has never had the opportunity to have the merits of its title claim determined (Pet. 9-11). This assertion is refuted by the record.

After the Association sought to intervene in the case in 1974, petitioner argued and (although petitioner now contends otherwise (Pet. 11)) the Indian Claims Commission expressly held that the Commission had before it evidence of extinguishment and that the Commission actually decided that petitioner's aboriginal title was extinguished. *Western Shoshone Identifiable Group* v. *United States*, 35 Ind. Cl. Comm. 457, 466-467 (1975), aff'd *sub nom. Western Shoshone Legal Defense and Education Association* v. *United States*, 531 F. 2d 495, 500 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976). Thus, petitioner had the opportunity when the issue was vividly brought to its attention at the time of the Association's attempted intervention, and indeed before, to argue that its aboriginal title to 12 million acres had not been extinguished. The Commission's determination at the time of the Association's attempted intervention that petitioner's aboriginal title was extinguished and that the Commission actually decided this question is now the law of the case, and it was entirely proper for the Commission to deny petitioner's subsequent request for a stay premised on a contrary legal position.

Furthermore, even after petitioner decided to change its litigating position and to claim that it retained aboriginal title to some 12 million acres, petitioner did not appeal to

the Court of Claims any of the determinations of the Commission that its title was extinguished. Petitioner confined its appeal to the issue of whether the Indian Claims Commission properly declined to stay proceedings.

Finally, it should be noted that petitioner initially sought the stay in the Commission and before the Court of Claims in large part in order to provide the Secretary of the Interior with an opportunity to determine *administratively* that petitioner retained aboriginal title to the 12 million acres in question. After reviewing petitioner's claims, the Department of the Interior concluded that it would not make such a determination administratively, although it did briefly consider the possibility of recommending that Congress enact legislation establishing a reservation for the Western Shoshone. Thus, petitioner has had the opportunity to make a presentation to the responsible Executive officials, as well, and did not meet with success. The Department's decision not to take administrative action on petitioner's claim and its determination that legislation would be necessary have removed a principal reason underlying petitioner's original request for a stay.

3. Petitioner broadly asserts that the actions of the Indian Claims Commission and the Court of Claims denying a stay work an injustice. This assertion is also without merit.

a. Petitioner stands to recover more than $26 million for the government's taking or extinguishment of its aboriginal title. This is a substantial sum by any measure, and it is compensation that Congress was not obligated to provide.

The Treaty of Ruby Valley did not "recognize" or confer on petitioner any property rights as against the

United States with respect to the more than 22 million acres of Nevada land involved in the present case. Article V of the Treaty merely acknowledged that the Western Shoshone *claimed* the lands described in that Article (Pet. App. 31a). See *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945). Accordingly, even if a court were to determine that the United States had never acquired or extinguished the Western Shoshone's aboriginal title to the 12 million acres petitioner now claims, and that petitioner therefore retains a present right to occupy those lands, Congress could immediately enact legislation extinguishing this right of occupancy without paying *any* compensation. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

The award of $26 million to petitioner may well constitute less than the present market value of a fee simple interest in the 12 million acres which petitioner now claims. But petitioner would not have a fee simple interest in the land or a right to occupy it permanently even if a court were to find that petitioner's aboriginal title has not yet been extinguished. The present market value of aboriginal title—an interest in property that is subject to immediate termination at the will of the Congress—is worth considerably less than a fee simple interest and probably less than the $26 million petitioner has recovered below.

What is more, Article IV of the Treaty of Ruby Valley provides that the area claimed by the Western Shoshone in that Treaty may be mined and opened for settlements and ranches and that timber may be taken for building, mills and other purposes. Thus, even without congressional action, the Executive may authorize extensive use of the lands to which petitioner now claims aboriginal

title. This makes petitioner's aboriginal title worth less than if congressional action were necessary to permit such competing uses. Thus, there is no reason to believe that petitioner will suffer any injustice by the recovery of $26 million.

b. Perhaps in recognition of the adequacy of the compensation awarded by the Commission, petitioner argues (Pet. 11) that the denial of a stay works an injustice because land is of more importance to it than money: money, once spent, is gone, but tribal lands protected by federal law from alienation can last forever to sustain the culture of the Western Shoshone. We appreciate the importance of land to the preservation of Indian culture, but this factor likewise does not warrant the granting of a stay here.

As explained above, even if petitioner were to succeed in demonstrating that it retains aboriginal title to 12 million acres in Nevada, Congress could immediately terminate that right without paying any compensation. An interest in land so readily terminated would not provide the security necessary to maintain petitioner's traditional culture. There is, moreover, every reason to believe that Congress would act promptly following a court decision in the District of Columbia or Nevada upholding petitioner's claim of aboriginal title to restore some or all of the 12 million acres now claimed to national forests, grazing, or other public uses, in view of the heretofore uninterrupted use of the lands for these purposes. In that event, a stay of the present proceedings pending other judicial proceedings would have served no useful purpose.

There is, moreover, little likelihood that petitioner could succeed on the merits of its claim that the Western Shoshone aboriginal title to 12 million acres has not been

extinguished. The opening of the public domain for grazing and the establishment of national forests would appear to be entirely consistent with the terms of Article IV of the Treaty of Ruby Valley, discussed above, permitting the establishment of ranches and taking of timber, thereby undercutting petitioner's argument (Pet. 10 n.15) that these exercises of complete dominion over the land by the Executive did not have the congressional sanction petitioner maintains (*ibid.*) is necessary to extinguish aboriginal title. And the Treaty to one side, the creation of national forests and the opening of lands for grazing, now conducted under the Taylor Grazing Act, could themselves operate to extinguish aboriginal title, particularly where these actions have gone undisturbed for a long period of time. *United States* v. *Gemmill*, 535 F. 2d 1145, 1148-1149 (9th Cir. 1976); *United States* v. *Pueblo of San Ildefonso*, 513 F. 2d 1383, 1386 (Ct. Cl. 1975); *Tlingit & Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452, 466-468 (Ct. Cl. 1959). Cf. *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 475 (1915).

4. Even when the judgment in the present case becomes final and petitioner is barred from claiming before the Executive or in court that it retains aboriginal title to the lands embraced by the judgment, Congress would remain free to establish a reservation for the Western Shoshone. The denial of a stay below therefore does not foreclose petitioner from obtaining what is apparently its ultimate objective: a reservation.

Further, Congress is the appropriate forum for the consideration of petitioner's present-day demands for land. In aboriginal times, the largest permanent unit of organization among the Western Shoshone was the village; organization superseding that level was only temporary, although shifting and informal political and subsistence bonds interlocked the villages. 11 Ind. Cl.

Comm. at 391. At the present time, some Western Shoshone live on scattered tracts of trust land purchased in the 1930's and 1940's pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, and others live in towns and rural areas throughout the claims area (Pet. 6 n.10). Petitioner has been without a large reservation since the Treaty of Ruby Valley was entered into more than 100 years ago. Whether such a reservation—or a series of smaller colonies—should now be established therefore raises difficult questions of policy for the Executive and the Congress which do not comfortably lend themselves to judicial resolution. As the Court of Claims stated in affirming the Commission's denial of petitioner's motion for a stay (Pet. App. 8a):

> [I]t is only Congress that could stay and undo the course of litigation at this late date, and if anybody should, it is only Congress. The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court.

See also *Northwestern Bands of Shoshone Indians* v. *United States*, *supra*, 324 U.S. at 354-358.

There is therefore no occasion to stay proceedings in the present case on the eve of final judgment in favor of other judicial proceedings in which petitioner is most unlikely to prevail and which would, in any event, be but one step toward eventual congressional action. Denial of a stay by the courts below was especially appropriate here because the effect of the stay would be to thwart the effectiveness of the claims procedure Congress has already established to provide a remedy for aboriginal

claims. If land, rather than money, is the preferred remedy at the present time, that proposal should be presented to the Congress.[10]

---

[10]The Ninth Circuit held in *United States* v. *Dann, supra*, that the decision by the Indian Claims Commission in the instant case that petitioner's aboriginal title had been extinguished did not collaterally estop the defendants in *Dann* from defending the trespass action brought by the United States on the ground that petitioner's aboriginal title, on which they relied, had *not* been extinguished. The principal basis for this holding was that the judgment in the instant case had not yet become final and therefore did not give rise to collateral estoppel. Contrary to petitioner's suggestion (Pet. 16-17), this holding is not in conflict with the decisions below. The Indian Claims Commission and the Court of Claims did not rely on the doctrine of collateral estoppel in denying a stay. They merely concluded that the equities did not weigh in favor of petitioner's request for a stay, in view of the lateness of petitioner's change in litigating strategy (Pet. App. 5a-8a, 22a-23a).

The Ninth Circuit went on to find, however, that the question of extinguishment of aboriginal title had not actually been decided by the Indian Claims Commission and that the doctrine of collateral estoppel would not apply in the *Dann* case for this additional reason as well. This holding by the Ninth Circuit is in conflict with the express holding by the Commission that petitioner's aboriginal title was extinguished, 11 Ind. Cl. Comm. at 416, 445, and its later holding at the time it considered the Association's motion to intervene that the Commission had considered and decided this question, 35 Ind. Cl. Comm. at 465-471. The decision of the forum in which the case was litigated—the Indian Claims Commission—should control with respect to what issues were necessary to its judgment and were actually litigated. Cf. *Restatement (Second) of Conflict of Laws* §95 (1971), and the Commission's conclusion here is clearly correct. Moreover, the *Dann* defendants were members of the Association that sought to intervene in the present case in 1974, *United States* v. *Dann, supra*, 572 F. 2d at 225, and they should therefore be bound by the Commission's rejection of the Association's argument that the extinguishment issue was not litigated. In any event, the significance of any conflict on this question will disappear upon entry of final judgment in the present case, because a judgment based on extinguishment of petitioner's title will bar petitioner, and all those in privity with petitioner, from asserting that petitioner retains aboriginal title. 25 U.S.C. 70u; Pet. App. 34a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L KLARQUIST
DEAN K. DUNSMORE
Attorneys

NOVEMBER 1979

DOJ-1979-11

MOTION FILED
OCT 22 1979

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION AND BRIEF OF:

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, MARY DANN and CARRIE DANN

JOHN D. O'CONNELL
44 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-5835

Counsel for Western Shoshone Legal Defense and Education Association, Mary Dann and Carrie Dann.

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO FILE BRIEF, *AMICI CURIAE*, IN SUPPORT OF PETITION

The Western Shoshone Legal Defense and Education Association, Mary Dann and Carrie Dann respectfully move for leave to file the attached brief, *amici curiae*, in support of the petition filed in this case.

The Association is an informal association of Western Shoshone Indians whose purpose is to provide legal

information and assistance to its members to enable them to preserve their traditional rights, values and religion. The Petitioner, Temoak Bands of Western Shoshone Indians, Nevada, is a federally recognized tribe comprised of that portion of the Western Shoshone who live on two colonies and one reservation. The majority of Western Shoshone Indians belong to other federally recognized organizations, a state organization, or follow the traditional way, unaffiliated with any government recognized political structure.

Mary Dann and Carrie Dann are Western Shoshone Indians who are members of the Association, but are not affiliated with the Temoak Bands of Western Shoshone Indians. The Danns, like many of their fellow tribesmen and their forebearers for thousands of years before them, use and occupy a portion of the aboriginal Western Shoshone lands which are the subject of this action. The Respondent United States, commenced an action against the Danns in 1974 in the United States District Court for Nevada, seeking trespass damages and an injunction forbidding their use of the land. *United States v. Dann*, U.S.D.C. Nev., No. 74-60 BRT. In that case the United States has sought to estop the Danns from asserting the unextinguished aboriginal title of the Western Shoshone based upon the findings and judgment of the Indian Claims Commission in this case. Despite the holding of the Court of Appeals for the Ninth Circuit that the Danns were not estopped and despite the remand of the case with direction to the district court to decide the title question in March 1978, 572 F2d 222, (Appendix B), the

United States has continued to urge the district court to not decide the validity of the Western Shoshone title and has repeatedly sought delay of that action with the apparent purpose of attempting to extinguish the Western Shoshone title by payment of the judgment in this case. (This case is discussed in the Petition at 16-17.)

In 1974, the Association joined with Frank Temoke, a traditional chief of the Western Shoshone, in attempting to intervene in this case before the Indian Claims Commission in order to remove claims for lands still owned and occupied by the Indians. The Commission refused to accept evidence concerning the alleged collusion, held an oral argument and denied the intervention because the allegations of collusion necessary to break the exclusive representative status of the Temoak Bands were not supported by any evidence. On appeal, the Court of Claims sustained that denial. *Western Shoshone v. United States*, 532 F.2d 495 (Ct. Cl. 1976). A petition for a writ of certiorari was made to this Court and denied. 429 U.S. 885 (1976). (That petition is attached in Appendix A).

The Association's members, particularly the Danns, have a direct interest in this case, for it is their land which will be taken from them, depriving them of their livelihood and destroying their culture and religion.

Although the Temoak Bands has now retained an attorney and petitioned this Court in an effort to protect the unextinguished title of all Western Shoshone, the Association and the Danns believe they can advance additional reasons for granting a Writ by analyz-

ing the ruling of the Court of Claims in light of the representational scheme of the Indian Claims Commission Act.[1] The Western Shoshone people are *not* changing their position. It is clear that the desire to maintain their lands and lifestyle was practically universal and consistent throughout the litigation.[2] The problem was, and is, that the procedures of the Indian Claims Commission were such that it was nearly impossible for the Indians to control litigation brought in their name.

---

[1] As stated by the Court of Appeals for the Ninth Circuit regarding this case: "Some difficult issues are presented in deciding the identity of parties question in the context of tribal litigation before the Commission. (See **Fort Sill Apache Tribe v. United States**, 477 F.2d 1360, 1362 (Ct. Cl. 1973); **Cherokee Freedom v. United States**, 181 Ct. Cl. 7873 (1963). See also **Western Shoshone Legal Defense and Education Ass'n v. United States, supra**, 551 F.2d 495.)" **United States v. Dann**, 572 F.2d 222, (9th Cir. 1978), Appendix B at B-8, n. 1.

[2] At the oral argument on the Association's attempt to intervene, the former claims attorney for the Western Shoshone Identifiable Group, Robert Barker, admitted that throughout the litigation the Indians asserted a fear of "losing their land":

> They are closely attached to their land. They love the land and they don't want to give it up. If they feel there is any possible right they have in the land, they want to assert it. And I don't blame them.
>
> If we could assert restoration of the land, fine. This has been raised and I have said, take it up with your congressman.
>
> . . . .
>
> The answer has been very simple. We can't restore this land. Argument on "Collusion", Ind. Clms. Comm. transcript at 23, Nov. 16, 1974.

Since the Indian Claims Commission could not "restore" the land, and since the claims lawyers' contract, which they wrote, was limited to bringing a claim, the claims lawyers took upon themselves to tell the Indians that what they wanted to do was "impossible". The Indians did not, and do not, need to have their title "restored" — they need to protect the title they have from extinguishment by operation of the Indian Claims Commission Act. 25 U.S.C. 70u.

The Association and the Danns wish to stress the implications to due process of law which would follow if the Temoak Bands is not given the opportunity to correct the threatened injustice to the majority of Western Shoshone whose home lands were bargained away without their consent or opportunity to be heard. The Temoak Bands is not in a position to argue this point as effectively as the Association and the Danns because the difficulties originated with the Temoak Bands' former counsel, and the Bands' new counsel is not as familiar with the actual history of the litigation.

Respectfully submitted,

JOHN D. O'CONNELL
Attorney for Western Shoshone
Legal Defense and Education
Association, Mary Dann and
Carrie Dann.

In the Supreme Court of the United States

OCTOBER TERM 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF, *AMICI CURIAE*, OF WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, MARY DANN and CARRIE DANN, IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

JOHN D. O'CONNELL
44 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-5835
Counsel for *Amici Curiae*

TABLE OF CONTENTS

Page

REASON FOR GRANTING WRIT

The stay below was sought to correct a gross miscarriage of justice which resulted from the denying of access to the Indian Claims Commission to the majority of Western Shoshone Indians who have no political affiliation with the representative plaintiff in whose name the claim was brought seeking damages for the "taking" of lands which, in part, are still owned and used by the Indians. Refusal of the relief will result in a denial of due process of law 1

CONCLUSION 6

TABLE OF AUTHORITIES

CASES CITED

Capital Grande Band of Indians v. Helix Irrigation Dist,
Docket No. 73-2956 (October Term 1973) 19a

Eisen v. Carlisle & Jacquelin,
416 U.S 156 (1974) 12a, 15a, 16a

Hansberry v. Lee,
311 U.S. 32 (1940) 10a, 12a, 15a

Mullane v. Hanover Bank and Trust Company,
339 U.S. 306 (1950) 12a, 15a

Quinalt Allottee Ass'n v. United States,
453 F.2d 1272 (Ct. Cl. 1972) 16a

Page

Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936 (Ct. Cl. 1965) 4a, 11a

Smith v. Swarmstedt, 16 How (57 U.S.) 288, 302-3 (1853) 13a

United States v. Dann, 572 F.2d 222 (9th Cir. 1978) 7a

United States v. La Chappelle, 81 F. 152 (1897) 9a

Western Shoshone Legal Defense & Educ. Assn. v. United States, 531 F.2d 495 (Ct. Cl.), *cert.* denied 429 U.S. 885 (1976) 6b

STATUTES, RULES and AUTHORITIES CITED

18 Stat. 689 ..... 5a

23 U.S.C. §1225(1) 2a

25 U.S.C. §70(j) 2a, 3a, 7a, 11a, 12a, 15a

25 U.S.C. §70(n) 9a, 11a

25 U.S.C. §70(p) 3a, 12a, 15a

25 U.S.C. §70(u) 3a, 7a

25 U.S.C. §477 .....10a

Rule 23, Federal Rules of Civil Procedure 11a, 12a

Rule 24, Federal Rules of Civil Procedure 11a, 12a

27 Am Jur, Equity, §152 .....19a

Page

APPENDICES

A. Petition for Write of Certiorari filed in Western Shoshone Legal Defense & Educ. Ass'n v. United States, 429 U.S. 885 (1976) 1a

B. Opinion of Court of Appeals in United States v. Dann, 572 F.2d 222 (9th Cir. 1978) 1b

C. Discharge of Counsel and Resolution of Temoak Bands filed in Instant Case 1c

D. Letters from Chairman of Temoak Bands Business Council to Secretary of Interior 1d

E. Letter to Chairman of Temoak Bands Business Council from Acting Associate Solicitor of Department of the Interior 1e

In the Supreme Court of the United States

October Term 1979

No. 79-340

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF, *AMICI CURIAE*, OF WESTERN SHOSHONE DEFENSE AND EDUCATION ASSOCIATION, MARY DANN and CARRIE DANN, IN SUPPORT OF PETITION FOR CERTIORARI

The bizarre caption of the decision below is symptomatic of the disease which has permeated the litigation throughout. It reads: *The Temoak Band* (sic.) *of Western Shoshone Indians, Nevada,* Appellant, *v. The United States and The Western Shoshone Identi-*

fiable Group, Represented by the Temoak Bands of Western (sic.) *Indians, Nevada,* Appellees. (Appendix A of Petition). The Court of Claims having previously held that the Temoak Bands was the exclusive representative of the entire Western Shoshone Identifiable Group with the right to pursue a litigation strategy contrary to the interess of even a majority of other members of the Group,[1] places the Temoak Bands as an *adverse* party to the Identifiable Group when the Bands joins the majority of the Group in seeking to prevent the loss of lands still owned by the Western Shoshone. The convolution necessary to maintain an appearance that *somebody* is the plaintiff in this action results in the Temoak Bands appearing as a party on *both sides* of the lawsuit.

Counsel of record specified by both the court below and the Indian Claims Commission for the Western Shoshone Identifiable Group, *represented by* the Temoak Bands, is Robert W. Barker, despite the fact that the duly constituted tribal counsel of the Temoak Bands, on behalf of the Temoak Bands and the entire Identifiable Group, had filed pleadings *pro se* discharging Mr. Barker and dissolving the attorney-client relationship. (Appendix C). The Justice Department insisted that the Commission could not receive pleadings *pro se,* but that the plaintiff could only address the Commission

[1] **Western Shoshone Legal Defense & Educ. Ass'n. v. United States, 531 F.2d 495 (1976).**

through Mr Barker.[2] Mr. Barker insisted that he could not be discharged without the approval of the Secretary of the Interior.[3] The Interior Department ruled that tribes *could* discharge an attorney without approval, but refused the Bands' request for assistance in stopping Mr. Barker (Appendix D), leaving the problem for resolution by the Commission. (Appendix E). The Commission and Court of Claims avoided the issue and heard from *both* the discharged counsel and the new counsel retained by the Temoak Bands. (Petition, Appendices D, A).

The decision below castigates the Indians for their failure to "change their position" earlier. When the Temoak Bands spent three years duly following the Government's procedures in an unsuccessful attempt to discharge their attorney of record because he would not accept their directions,[4] how can they be criticized for delay in making their position known? If the Temoak

[2] Government's Response to Plaintiff's Motion to Stay Proceedings, filed Nov. 26, 1976; Government's Response to Additional Motion, filed approximately Jan. 31, 1977. This of course was consistent with the Government's position throughout that the Commission should ignore all communications made to the Commission, various agencies of the Executive Branch and members of Congress protesting the manner in which the claim was being presented. However, previously the Government argued, successfully, that the protests were not properly styled or presented to the correct authority. See, Oral Argument on "Collusion", Indian Claims Commission, Nov. 14, 1975, Transcript 44, 62. But when the Indians finally figured out how to formally address the Commission, the Government contended that only the "attorney of record" can do so, i.e., that it is impossible for clients to inform a tribunal that their attorney is not representing their interests.

[3] Motion of Counsel for Plaintiff, filed Jan. 26, 1976.

[4] Discharge of Counsel and Resolution of Business Council of the Temoak Bands, No. 77-TM-03, filed with the Commission on Nov. 15, 1976, and attached hereto in Appendix "C".

Bands, with the holding of the court below that it was the exclusive representative plaintiff, with its federally approved constitution and ties to the Bureau of Indian Affairs, and with the assistance of counsel, could not control its attorney of record, how were the majority of Western Shoshone who did not belong to the Temoak Bands to make their wishes known?

This case has clearly been out of control of the Western Shoshone Indians from its inception. The claims lawyer, Mr. Barker, has admitted before the Commission that at meetings conducted throughout the litigation the Western Shoshone expressed their desire to keep the land:

> . . . I have set forth in our brief a long history of presenting this to the tribe or Identifiable Group for decision. Where the issue was made, should we pursue to try to protect our land on whatever theory, you know, the Indians were afraid of losing their land. They are closely attached to their land and they don't want to give it up. If they feel there is any possible right they have in the land, they want to assert it. Indian Claims Comm., Oral Argument on "Collusion" Transcript 23, Nov. 14, 1974.

However, neither Mr. Barker or the numerous agents of the United States, to whom the Indians protested, mentioned to he Commission that the Indians did not want to exchange land for money until the Association obtained its own counsel and moved to intervene. The Western Shoshone people could neither control their lawyer nor effectively fire him. The "Western Shoshone Identifiable Group" is a mere shell with no structure of any kind, yet alone a government. It is in fact a front, a paper client for what the Commission regarded to be the real party in interest, a law firm with a strong financial interest in pushing the claim through.[5]

The procedural obstacles to intervention in the Commission, with the attendant denial of due process to members of the Identifiable Group with no political avenue of redress to the "representative plaintiff", are set out in the attached petition for a writ of certiorari (Appendix A) which was previously denied by this Honorable Court.[6] *That petition is resubmitted hereby as additional reasons for granting the Petition of the Temoak Bands.* While Constitutional infirmaties described therein are not squarely before the Court in this proceeding, the Temoak Bands request for a stay, in order for the parties to correct the miscarriage of justice resulting from the "selling" of other Western Shoshone Indians' land from under their feet, will enable the parties to cure the Constitutional infirmaties in the proceedings. Failure to permit the parties to take remedial

---

[5] The Indian Claims Commission Act provides for a contingent fee. 25 U.S.C. 70n. In a claim for land taken by the United States, there is direct correlation between the amount of land the attorney can prove was taken and the size of his fee. Impecunious Indians wishing to preserve their title are confronted with lawyers having a "built in" conflict of interest, since the attorneys will be rewarded if they ignore the client and claim damages for the "taking". Proving the taking, of course, is made easy by the United States, which gains clear title. The Commission and Court of Claims have not compensated for this deficiency in the Act by increasing their vigilence. Stipulations as to the "taking" are routinely encouraged to facilitate the proceedings. See, e.g., **Western Shoshone Legal Defense & Educ. Ass'n. v. United States, supra,** at 500.

[6] **Western Shoshone Legal Defense & Educ. Ass'n. v. United States,** 429 U.S. 885 (1976).

action will not eliminate the problem — it will be forced into other forums where it will have to be litigated.[7]

The United States has no legitimate interest which would be prejudiced by a delay. In fact, as the guardian of its Indian wards, it has the obligation to see that Indians are not swindled. The court below surely perverts the spirit of the Chief Justice's remarks pertaining to courts' obligations "to see to it that dilatory tactics by neither party can frustrate speedy justice", (Petition, Appendix at 7a), by quoting them as justification for denying the parties the stay necessary to correct a gross miscarriage of justice.

CONCLUSION

The representational scheme of the Indian Claims Commission Act by its failure to provide access to individuals and groups who are bound by the result but lack any control over the "representative plaintiff" raises grave due process of law questions. (Developed in Appendix A). The deficiencies in the Act as applied in this case will result in a gross miscarriage of justice by depriving many Western Shoshone of their land, livelihood and culture. These deficiencies can be corrected by the parties. The interest of the court below in

[7] The Government's attempts to use "collateral estoppel" to keep Western Shoshon Indians from asserting their title in **United States v. Dann**, 572 F.2d 222 (9th Cir. 1978) (Appendix B), will of course take on new vigor and strength by operation of the bar provisions of the Indian Claims Commission Act, 25 U.S.C. 70u. "The difficult issues . . . presented in deciding the identity of parties . . . before the Commission," noted by the Court of Appeals in **Dann, supra**, Appendix B at B-8, n. 1, will not be eliminated by the payment of the claim into the Treasury. Payment will render an equitable decision more difficult, both legally and politically.

"speedy justice" is not sufficient reason to deny the parties the opportunity to achieve true justice.

The Western Shoshone People implore this Honorable Court to grant the Petition of the Temoak Bands and summarily reverse the court below with instructions to grant a stay until the validity of the Western Shoshone title to what is left of the desert lands they have used and occupied for over ten thousand years is determined.

Respectfully submitted,

JOHN D O'CONNELL
44 Exchange Place
Salt Lake City, Utah 84111

October, 1979.

APPENDIX A

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION, AND FRANK TEMOKE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, Western Shoshone Legal Defense and Education Association and Frank Temoke, petitioners to stay proceedings and appellants in the courts below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims herein.

OPINIONS BELOW

The opinion of the Indian Claims Commission dis-

missing the Petition to stay proceedings and for leave to present an amended claim is reported at 35 Ind. Cl. Comm. 457, and is set forth at page 1a of the Appendix to this Petition. The opinion of the United States Court of Claims affirming the decision of the Indian Claims Commission, decided February 18, 1976, is reproduced at page 28a of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1976. A timely motion for rehearing was denied on April 23, 1976. The jurisdiction of this Court is invoked under the provisions of Title 23 U.S.C. §1225(1). The time for filing this Petition expires July 22, 1976.

QUESTIONS PRESENTED

1. Whether the Constitutional requirements of due process are met when interested Indian beneficiaries who are not members of the representative organization conducting litigation in their behalf, and do not agree with factual contentions which are advanced in their behalf and which are adverse to their property interests, are not afforded notice and an opportunity to be heard and present evidence?

2. Whether the due process requirements of notice and an opportunity to be heard may be limited by provisions of the Indian Claims Commission Act requiring a showing of "collusion"[1] as a prerequisite to notice and hearing?

---

[1]Section 10, Indian Claims Commission Act, 25 U.S.C. §70(i).

3. Whether present possessory and treaty rights of native Americans to real property can be barred by laches, first, within the concepts of sovereign immunity and the wardship relationship and, second, where the "delay" cited is 23 years of efforts by claims counsel to achieve a different result than desired by the Indian beneficiaries?

STATUTES INVOLVED

Pertinent provisions of Sections 10, 17 and 22 of the Indian Claims Commission Act, respectively, are as follows:

25 U.S.C. §70(i)

> Presentation of Claims. Any claims within the provisions of this Act may be presented to the Commission by any members of an Indian tribe, band or other identifiable group of Indians, as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission.

25 U.S.C. §70(p)

> The Commission shall give reasonable notice to the interested parties and an opportunity to be heard and to present evidence before making any final determinations upon any claim.

25 U.S.C. §70(u)

> When the report of the Commission determining any claimant to be entitled to recover has

been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

STATEMENT OF THE CASE

Petitioners are Western Shoshone Indians who, as members of the Western Shoshone Identifiable Group, are bound by the proceedings initiated in 1951 by the Temoak Bands of Western Shoshone Indians, on behalf of the entire anthropologically defined[2] Western Shoshone Identifiable Group before the Indian Claims Commission, seeking compensation for the taking of Western Shoshone lands by the United States. The Temoak Bands is an Indian Reorganization Act Corporation limited to the Western Shoshone Indians of the Elko Colony and

[2]Under the Indian Claims Commission Act, the claimant may be a tribe, band or "identifiable group". The latter term includes an aggregation of descendents of an Indian Band from whom the claim derives. Such a group need not have any political structure or other organization. See, e.g., *Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians*, 355 F.2d 936 (Ct. Cl. 1965).

South Fork Reservation, Nevada. The great majority of Indians constituting the remainder of the Western Shoshone Identifiable Group, and whose interests petitioners are attempting to protect, do not belong to the Temoak Bands or any other Indian Reorganization Act Corporation and reside in scattered settlements throughout their ancestral desert homeland.[3]

Prior to, and throughout, the claims proceedings before the Indian Claims Commission, the petitioners and their predecessors have repeatedly informed the Claims Attorney representing the Identifiable Group, agents of the United States and the Temoak Bands that they objected to the inclusion, within the claim, of approximately twelve million acres of land to which they still assert unextinguished aboriginal and treaty title.[4]

[3]Due to their remoteness and their willingness to concede access to those small parts of their lands which the white man thought had value in the Treaty of Ruby Valley of 1863, 18 Stat. 689 (1875), the Western Shoshone were never rounded up like most Indian tribes, but, for the most part, remained in their native valleys and clung to their traditional language, customs, religion and social organization. Petitioners alleged and made proffers of evidence below, that Petitioner Frank Temoke is a traditional chief of the Western Shoshone and that the majority of Western Shoshone people support the position of the Petitioner Association in seeking to preserve their rights not ceded in the Treaty of Ruby Valley. No one claims that these "traditional" Western Shoshone people are subject to the authority of or have any political ties with, the Temoak Bands, except by their arbitrary and unconsenting joinder in this litigation. While the United States may find it easier to do business with the English-speaking and government organized Temoak Bands Business Council, it has not claimed that the "traditional" Western Shoshone people are legally non-persons or that they do not have a right to maintain their traditional social and political organization.

[4]The validity of petitioners' substantive theory of unextinguished title is not involved in this case, since petitioners were never given the opportunity of presenting it to the Commission below and, therefore, must be taken as true for the purposes of these pro-

Despite these protests, the Temoak Bands, the Claims Attorney and the United States neither removed these lands from the claim nor made any effort to litigate the issue of whether or not present title to these lands rested with the Western Shoshone or the United States.[5] In the event that the claim as constituted proceeds to final judgment and award, petitioners and all other members

ceedings. The Court of Claims noted that petitioners' position in this regard was not "overwhelming or clear as day" but an "open question which could be decided either way" (App. 46a). The Court of Claims simply believed that the abandonment of this claim of title to twelve million acres of ancestral lands was a decision the Representative Organization was entitled to make despite the protests of the alleged majority of owners who did not belong to the Representative Organization *Id.* (App. 46a). It should be noted that petitioners proffered to prove and submitted an affidavit by an officer of the Temoak Bands, that a decision electing remedies was never made by *any* Western Shoshone Indians, including the Temoak Bands. The Claims Attorney and agents of the United States represented to the Indians that there was no choice but to seek monetary compensation.

[5]The claim, as presented by the Temoak Bands, alleged aboriginal ownership of the lands in question and that large portions of the lands had been disposed of by the United States to settlers or others, or had been seized by the United States. The United States denied that the Western Shoshone had ever had title and in 1957, the Commission tried the issue of whether the Indians had had aboriginal title. In 1962, the Commission decided that the Indians had held aboriginal title to 24,396,403 acres in Nevada and California. Neither party alleged continuing title in the Indians to any of the land nor was any evidence produced pertaining to how the United States extinguished the Indians' title. Relying upon the representations of the parties, the Commission found that: ". . . the United States, without payment of compensation, acquired, controlled, or treated these lands . . . as public lands from a date or dates long prior to this action to be hereinafter determined upon further proof unless the parties agree upon a date." The necessity of "further proof" regarding the taking was obviated by the parties stipulating to an "average evaluation date" of 1872. The issue of the value of all the land as of 1872 was tried in 1967 and a decision awarding the Indians $26,550,000.00 was reached on October 10, 1972. The claim is presently awaiting decision of the issue of offsets.

of the Western Shoshone Identifiable Group will be forever barred from asserting their claim of title to these lands[6] which will not only deprive them of their property but will destroy their culture which is based on an unusually strong religious and psychological attachment to their land.

In April, 1974, petitioners filed a Petition with the Indian Claims Commission requesting a stay of proceedings and the opportunity to amend the claim to remove the lands to which they claimed title. In order to obtain access to the tribunal in the face of the exclusive representation provisions of the Act,[7] the Petition alleged that the United States and the Temoak Bands were acting in collusion by representing to the Commission that the United States had taken these lands when, in law and fact, they still belonged to the Western Shoshone. After the filing of responsive pleadings denying the collusion, the Commission held an oral argument limited to the issue of the definition of "collusion". The Commission denied petitioners the opportunity to present evidence in any form prior to or at that hearing.[8]

[6]Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70(u), provides that payment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy. The respondent United States has sought, albeit prematurely, to use the interlocutory Commission rulings to bar members of the Petitioner Association from asserting the Western Shoshone title to some of these lands as a defense to efforts of the United States to obtain an order forbidding Indians' use of the lands. *United States v. Dann,* (U.S.D.C. Nev. R-74-60, BRT, pending).

[7]Section 10, Indian Claims Commission Act, 25 U.S.C. §70(i).

[8]Petitioners repeatedly requested an evidentiary hearing to settle the contradictory factual assertions raised in the exchange of pleadings. Prior to the "oral argument on collusion", counsel for

Following the oral argument, the Petition was dismissed by the Indian Claims Commission. An appeal from that decision was taken by petitioners to the Court of Claims which affirmed the decision noting that it was "impressed by two intertwined and striking sets of facts". First, that petitioners' motion was filed twelve years after the Commission had decided the land had been taken, and second, that the petitioners were aware for a long time of the position taken by the Claims Attorney. (App. 34-35a).

Before both tribunals, petitioners argued that they were entitled to the basic notice and hearing rights required by the due process clause of the Constitution and that the notice, hearing and exclusive representation provisions of the Indian Claims Commission Act must be interpreted consistent with those rights.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS

the Commission instructed petitioners' attorney that the Commission would accept no evidence and that argument would be restricted to the definition of the term "collusion". (Transcript, Oral Argument before Indian Claims Commission, November 14, 1974, pp. 15, 56, 67-68) Throughout the decision of the Court of Claims below, that court complains of petitioners' failure to support its allegations and proffers of proof with affidavits or evidence despite the express refusal of the Commission to accept such evidence. Affidavits were attached to the briefs submitted to the Court of Claims rebutting those attached to the brief of the Claims Attorney. The Commission did not call for proffers of proof nor was there a formal opportunity for making them. Such proffers of proof as are in the record appear as answers to questions or to rebut self-serving factual statements advanced by the Claims Attorney.

CONCERNING DUE PROCESS UNDER THE EXCLUSIVE REPRESENTATION PROVISIONS OF THE INDIAN CLAIMS COMMISSION ACT.

In passing the Indian Claims Commission Act, it is apparent that Congress intended to provide a vehicle whereby Indian groups could obtain compensation and the United States obtain a release of liability for past wrongs done to the Indians by the government. However, the interpretation placed upon the exclusive representation provisions of the Act and the mode of intervention procedure imposed by the Indian Claims Commission and Court of Claims in this case, has converted the Act into another instrument capable of perpetrating new wrongs upon native Americans.[9] The process of separating Indians from their lands by finding some unauthorized Indian willing to sell land on behalf of other Indians is ancient and was condemned by the judicial branch even in the nineteenth century. See *United States v. La Chappelle,* 81 F. 152 (1897). To reinstitute this fraudulent practice and legitimize it in the name of judicial expediency, not only perverts the Indian Claims Commission Act, but actively involves the judicial branch in what has historically been the exclusive shame and dishonor of the executive and legislative branches. This cannot be done without violating the fundamental Constitutional precepts of due process of law which protect all Americans. This

[9]The danger of abuse is further heightened by the fact that claims counsel are compensated in proportion to the size of the monetary award, 25 U.S.C. §70(n), providing incentive to such counsel to prove that as much of their clients' land as possible now belongs to the United States.

Court should issue a Writ of Certiorari to review the decisions below in order to protect the integrity of the courts of the United States, establish that the Anglo-American derived concept of due process extends across cultural as well as raciol boundaries, and to reaffirm the procedural right of all Americans involved in representative actions.

In 1962, the Indian Claims Commission found that the Temoak Bands had the right to act as exclusive representative on behalf of the entire Western Shoshone Identifiable Group (App. 37a)[10] and the Court of Claims in its decision below, held that petitioners must show "fraud, collusion, or laches" pursuant to Section 10 of the Act,[11] in order to gain independent access to the Commission (App. 37a). The wording of Section 10 seems to indicate that Congress intended a tribal organization to be the exclusive representative of the entire tribe, band or

---

[10]This finding was apparently predicated upon the approval of the Temoak Bands charter by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. §477, and the assumption that it is constitutionally permissible for the Secretary, quite arbitrarily, to bind unconsenting Indians such as petitioners to an "exclusive representative." That is so because neither the findings of the Commission nor the determination of the Secretary even purport to determine the adequacy of representation that this Court said was a necessary prerequisite to representative proceedings in *Hansberry v. Lee*, 311 U.S. 32 (1940). Moreover, the record is devoid of any evidence to support the lower courts' conclusion that the Secretary conferred authority on the Temoak Bands to maintain this suit on behalf of other Western Shoshone Indians who are not members of the Temoak Bands. The approval by the Secretary of the Indian Reorganization Act Corporation conferred authority to generally represent its members, but it did not confer such authority as to the entire group of Western Shoshones who were plainly not its members. Even as to its own membership there is no evidence that the Temoak Bands was "recognized" for the purpose of bringing this suit.

[11]25 U.S.C. 70(i).

group only where the Secretary had recognized the authority of the tribal organization as the general representative of "such tribe, band or group", that is, where the tribal organization and the claiming entity were coextensive, and all the members of the entity would have political redress through the channels of the tribal organization.[12] However, the Commission and the Court of Claims in the instant case, have interpreted Section 10 so that any "recognized" tribal organization has the privilege of exclusively representing an entire "identifiable group," regardless of whether the tribal organization is coextensive with the claimant group or, as in the instant case, is merely a minority sub-group, which happens to have a federally approved charter to govern the subgroup. Whether created by Congress or judicial interpretation, the result is a form of class or representative action where most members of the "identifiable group" have no political or other internal mechanism to control the representative before the Commission. However, neither the Act nor the Rules of the Indian Claims Commission contain the numerous safeguards provided non-appearing members of class actions in Rule 23, Federal Rules of Civil Procedure, and available to intervenors generally under Rule 24, Federal Rules of Civil Procedure.

Under Section 10 of the Act, the only exception to the exclusive privilege of representation is where "fraud, collusion, or laches" is shown to the satisfaction of the Commission. While the issue was thus cast in terms of

---

[12]Prior to the instant case, this was the interpretation of Section 10 adopted by the Court of Claims. See *Turtle Mountain Brand of Chippewa Indians v. United States*, 490 F.2d 935, 954 (Ct. Cl. 1974 [Discussed n. 18, (App. 48a)]

"collusion", in reality the question was one of "access" involving "notice" and "opportunity to be heard and present evidence". Therefore, petitioners sought an interpretation of "collusion" which would give them the opportunity to appear simply because the representative entity and the United States were concurrently, and in petitioners' view, falsely maintaining that title to their lands had passed to the United States. Petitioners contended that such an interpretation, permitting access to the tribunal which was adjudicating their rights, was mandated by the holdings of this Court pertaining to the due process rights of non-appearing members of representative actions, e.g., *Eisen v. Carlisle & Jacquelin,* 416 U.S. 156 (1974); *Mullane v. Hanover Bank and Trust Company,* 339 U.S. 306 (1950); *Hansberry v. Lee,* 311 U.S. 32 (1940).

The Commission and the Court of Claims below rejected this construction in favor of giving the representative organization, the Temoak Bands, a free hand, regardless of the contrary interests of the remainder of the Identifiable Group. The vice in such a construction is obvious, and the Constitutional objections which are of concern to this Court are clear, when the lower courts' reading of the "collusion" provisions of Section 10, as obviating the "notice" and "opportunity to be heard" provisions of Section 17, are considered. The result is that neither the Act nor the Rules of the Indian Claims Commission afford the numerous safeguards provided non-appearing members of class actions in Rule 23, Federal Rules of Civil Procedure, and available to intervenors generally under Rule 24, Federal Rules of Civil Procedure. This Court

should consider if a reading of Section 10 which does not incorporate those safeguards is Constitutionally permissible. E.g., *Smith v. Swarmstedt,* 16 How [57 U.S.] 288, 302-3 (1853).

Nor is the question limited to Indian claims under the Act. Native Americans, among other minorities, are increasingly involved in representative proceedings before the federal district courts. Recent decades have also seen a proliferation of representative proceedings in the form of class actions, shareholders' derivative suits, and representative actions by protective committees or similar organizations such as in the areas of consumer and environmental protection. The expanding use of doctrines such as collateral estoppel also require careful consideration of safeguards in representative proceedings.

In the alternative to their request for a liberal construction of the term "collusion", petitioners also requested an opportunity to produce evidence before the Commission showing "collusion" between the United States and Counsel for the Temoak Bands under *any* definition of that term. However, the Commission declined to either liberally interpret "collusion" between the United States and counsel for the Temoak Bands and grant a hearing on the title question, or hold an *evidentiary* hearing on the threshold question of "collusion" as defined by the Commission. Instead, the Commission adopted the Black's Law Dictionary definition of "collusion" and then, *based solely on the evidence put in the record by the parties charged with collusion,* found that no collusion had been shown. (App. 9-16a)

It is respectfully submitted that this Court should

issue a Writ of Certiorari to determine if Indian claimants who are before the Indian Claims Commission as members of an "identifiable group" have the right to independent access to the Commission where they have no political or other control over the representative organization, and that organization, in agreement with the United States, is taking a position adverse to the property interests of those seeking access. In other words, do Indians have the minimum right to access to the tribunal affecting their property interests which this Court has guaranteed to other Americans? If not, and if Indian claimants have the burden of proving an actual secret, collusive agreement in order to gain access, this Court should decide whether such Indians have, at least, a basic due process right to present evidence to meet the burden of proof.

The action of the Court of Claims proceeds on the assumption that petitioners are bound by the 1967 decision of the Commission concerning the value of Western Shoshone lands, entered pursuant to the 1966 stipulation of the Identifiable Group and the government on the valuation. That might well be so had petitioners been accorded notice and an opportunity to be heard at that time, but the disposition by the Court of Claims merely begs that crucially important question. In fact, the issues of notice and opportunity to be heard were scarcely addressed, and petitioners were given no opportunity — despite their request — to adduce evidence.

The issue is one addressed to the Constitutional requirement of procedural due process. This Court has said that when a state adopts a procedure for representative proceedings, the requirements of due process are that

"the procedure [be] so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure full and fair consideration of the common issue", *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). Is the requirement any less if the representative procedure is devised by an act of Congress and judicial interpretation, or if it is Indian rights at issue rather than those of a black minority?

It is apparent that Congress did not intend to deny interested parties access to the Indian Claims Commission. Section 17 of the Indian Claims Commission Act declares that "interested parties" are entitled to "notice" and an "opportunity to be heard and to present evidence".[13] In other settings, those words have been held to require notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Company*, 399 U.S. 306, 314 (1950). See also, *Eisen v. Carlisle & Jacquelin*, 416 U.S. 156 (1974).

The holdings of the lower tribunals in this case, effectively repeal Section 17 of the Act while enhancing the barriers to access to the Commission created by the exclusive representation provisions of Section 10 of the Act. The Court of Claims, without so much as an inquiry into whether actual notice had been afforded petitioners, and without any consideration that the case was not at the

---

[13]25 U.S.C. §70(p).

final judgment stage,[14] concluded that petitioners were chargeable with notice of the legal niceties of these proceedings and bound by their failure to directly contact the Indian Claims Commission at an earlier date. To the contrary, this Court has said that:

> ". . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Eisen, supra,* at 315.

The Court of Claims recently declared that "the jury is not yet in" on the binding effect of class judgment on absentees." *Quinalt Allottee Ass'n v. United States,* 453 F.2d 1272, 1275 (Ct. Cl. 1972). This Court, in *Eisen v. Carlisle & Jacquelin,* 416 U.S. 156 (1974), supplied the missing verdict that class members are entitled to careful notice and an opportunity to withdraw. The disposition of this matter by the lower courts is inconsistent with that important recent precedent, at least if due process is the same in these related settings. If it is not, and Indian groups are to be subjected to second class due process, such a radical exception to one of the of the most funda-

[14]The Court of Claims has previously held that the interlocutory decisions of the Indian Claims Commission are not final judgments and can be modified at any time up to the final report of the judgment to Congress. See *Caddo Tribe of Oklahoma v. U.S.* 140 Ct. Cl. 63, 81 (1957).

mental precepts of the Constitution should only be implemented after review by this Court.

II.

THE LOWER COURTS' TREATMENT OF THE LACHES QUESTION SO FAR DEPARTS FROM ACCEPTED PRACTICE THAT REVIEW SHOULD BE GRANTED.

The Court of Claims, with commendable candor, acknowledged its decision to be based upon the supposed laches of petitioners in (1) filing their Petition twelve years after the Commission's determination that title was extinguished (App. 34a), and (2) in that petitioners were aware "for a very long time" of the position that had been taken by Claims Counsel (App. 35a). Yet there is no suggestion that any party is prejudiced by the delay, or that the delay was unreasonable, measured by petitioners' degree of sophistication or access to independent legal counsel.[15] There is also no suggestion of any legal or pro-

[15]At App. 43a, the Court of Claims alludes to "prejudice to the other parties," but no such prejudice is recited and in context it is clear that the Court had reference to the investment in time by claims counsel. While the Indian Claims Commission Act in Section 15, 25 U.S.C. 70(n) provides for compensation of Claims Attorneys in proportion to the size of the award, that is, the amount of Indian land such counsel can show has been taken by the United States, there is no provision for providing legal assistance to Indian groups who wish to preserve claims of title to land or, at least, test the validity of such title before accepting compensation. Until recently, the obtaining of counsel to undertake litigation of this size was practically impossible for traditional Indians. Documents submitted to the Commission and Court Claims show repeated attempts by petitioners to obtain independent counsel over many years.

cedural barrier to the Commission entertaining the proposed amended claim, however late it had been asserted and, indeed, there was no legal barrier to amendment of the claim since the case had not yet reached the final judgment stage.[16] To the contrary, the Court of Claims based its ruling on laches on prejudice to the Claims Attorney:

> On this Nevada-land phase of the Western Shoshone claims there was very little left to do; much time had passed, and much had been done. (App. 35a)
>
> The members claiming to represent the majority interest are required to make their position formally known to the Commission and the other parties as soon as possible—and not after much work has been done, and years have passed . . . It is far too late . . . to upset the applecart after the fruit has been so carefully collected and piled . . . (App. 50a)

The respondents' concern over delay which would occur if petitioners were afforded their day in court seems less than genuine when the amount of time those parties have been willing to consume in their efforts to keep petitioners from being heard is considered. It should also be noted that there would have been no delay if the respondents had timely notified the Commission themselves that petitioners were asserting title to the twelve million acres.

---

[16]The "collusion" exception to the exclusive representative provisions of Section 10, 25 U.S.C. § 70(i) does not contain any time limitation and the Court of Claims has previously held that the interlocutory decisions of the Indian Claims Commission can be modified at any time up to final report to Congress. See *Caddo Tribe of Oklahoma v. United States*, 140 Ct. Cl. 63, 81 (1957).

The lower courts' treatment of the laches issue so far departs from accepted legal principles, in at least three respects, that review by this Court is appropriate.

First, the doctrine of laches is based upon the principle that asserting a stale claim will cause prejudice "to an adverse party."[17] If that doctrine is to be expanded to protect the investment of time by counsel in achieving a result not desired by the litigant, or the inconsistent efforts of a tribunal which is invested with the responsibility of preserving the claim, the wisdom of such an extension merits the attention of this Court.

Second, the doctrine of laches is normally not invoked against Indian claimants because of their wardship relation with the sovereign. It is axiomatic, of course, that laches may not be invoked against the sovereign, or against Indians when they assert rights that might be asserted for them by the sovereign. See Brief of U.S., Amicus Curiae in opposition to Petition for Certiorari in *Capital Grande Band of Indians v. Helix Irrigation Dist.*, Docket No. 73-2956 (October Term, 1973). If laches is to be invoked against Indians by the United States in pressing their claims, it should be only after this Court has examined the wisdom of such a change in the policy of the law.

Third, counsel for the Identifiable Group, the Temoak Bands, and various agents of the United States had been informed before, and throughout the litigation, that petitioners and their predecessors wished to assert their title rather than seek money for their lands. That

---

[17]E.g., 27 Am Jur, Equity, §152.

these parties succeeded in keeping the Commission uninformed that the owners of the land were objecting, and relied upon the inability of isolated and impoverished Indians to secure independent counsel to make a formal presentation, is certainly not reason to give them the equitable protection of laches.

CONCLUSION

This case presents issues of procedural due process in representative actions which are of great importance in view of the burgeoning utilization of such actions as society becomes more complex. The goal of procedural due process is, at least, to give those affected by litigation an opportunity to be heard in protection of their interests. The interests involved in this case are of the greatest magnitude—in dollar terms by Anglo-American values, and in terms of cultural survival by traditional Western Shoshone values. The national publicity associated with this case is indicative of the interest all Americans have in seeing whether the Indian Claims Commission Act is a sincere attempt to remedy centuries of wrongs against Native Americans or just another scheme for spending taxpayers' money primarily for the benefit of the implementors of the system. These aspects of the Indian Claims Commission Act have not been previously examined by this Court.

It is respectfully submitted that this Court should issue a Writ of Certiorari not only to clarify the rights

of persons bound by representative proceedings, but to establish the integrity and credibility of the judicial branch of government in the eyes of all Americans.

Respectfully submitted,

JOHN D. O'CONNELL
KATHRYN COLLARD
GERALD H. KINGHORN
Twelve Exchange Place
Salt Lake City, Utah 84111
Attorneys for Petitioners

APPENDIX B

United States Court of Appeals Ninth Circuit

Appeal No. 77-1696

(Decided March 15, 1979)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY DANN and CARRIE DANN,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Nevada

Before: BROWNING and HUFSTEDLER,
Circuit Judges, and BONSAL*, District Judge

PER CURIAM:

The Danns, who are Western Shoshone Indians, appeal from a judgment in favor of the Government in an action brought by the Government for trespass. The Dann's were charged with grazing their livestock on federal lands in the Elko Grazing District without a

---

* Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York, sitting by designation.

permit from the Bureau of Land Management. The Danns admitted that they had grazed the livestock on the lands, but they alleged that the Bureau lacked authority to exclude them because the lands were beneficially owned by the Danns and other members of the Western Shoshone Tribe. The Government and the Danns moved for summary judgment, and the district court granted the Government's motion. The district court held that collateral estoppel foreclosed the Danns from asserting that they had title to the lands because the Indian Claims Commission, in proceedings before the Commission on behalf of the Western Shoshone, had ruled that the lands had been acquired by the United States and that the Indians' title has been extinguished. The district court enjoined the Danns from grazing their livestock on the lands without proper federal authorization and assessed them $500.00 damages. This appeal followed.

Two issues are raised on appeal: (1) Are the Danns collaterally estopped from litigating the title of the Western Shoshone Tribe to the lands in question by the decision of the Indian Claims Commission; and (2) if the title issue is not precluded, do the Western Shoshone hold beneficial title to the lands? We hold that the proceedings before the Indian Claims Commission did not foreclose litigation of the title issue. We decline to reach the title question, and we remand the case to the district court for the purpose of deciding title.

A brief description of the factual background of this dispute is useful in understanding the nature of the

issues which are presented before us. When the Treaty of Guadelupe-Hidalgo was signed in 1848, the Shoshone Nation used and occupied about 80 million acres of land, which now form parts of Idaho, Nevada, Utah, Colorado, and Wyoming. In northern and central Nevada, the Western Shoshone occupied 22 million acres of land. As non-Indian settlers moved across and settled in these areas, disputes erupted between the Indians and the non-Indians. In 1862, President Lincoln appointed a special commission to negotiate a peace treaty with the Shoshone. The commissioners were instructed specifically, on July 22, 1862, "that they were not expected to negotiate for the extinction of the Indian title but for the security of roads over the lands and 'a definite acknowledgement as well of the boundaries of the entire country that they [the Indians] claim.'" (*Northewestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 347 (1945).) The commissioners eventually negotiated five treaties between July and October, 1863, with different Shoshone groups: Treaty of Fort Bridger with the Eastern Bands, Treaty of Box Elder with the Northwestern Bands, Treaty of Tuilla Valley with the Shoshone-Goship Bands, Treaty of Soda Springs with the Mixed Bands of Bannocks and Shoshone, and Treaty of Ruby Valley with the Western Bands. The only treaty directly involved in this case is the Treaty of Ruby Valley, signed October 1, 1863, and ratified as amended October 21, 1869 (18 Stat. 689).

Under the Treaty of Ruby Valley, the Western Shoshone agreed to the safe passage of white emigrants

and travelers across their country, to the establishment of military posts and telegraph, overland stage and railway lines, and to the opening of their lands to prospecting, mining, farming, and ranching by whites. The Treaty also defined the boundaries of the Western Shoshone land, and provided that whenever the President "shall deem it expedient" to provide reservations for the Western Shoshone "within the country above described" the Indians would remove themselves to those reservations.

By 1872, about 20 thousand non-Indians resided within the Shoshone tract. The increasing displacement of the Indian population led President Hayes to create a reservation for the Western Shoshone at Duck Valley. However, the Duck Valley Reservation was outside the Western Shoshone territory, and not "within the country above described" in the language of the Treaty of Ruby Valley. A small minority of Western Shoshone moved to the Duck Valley Reservation. As of 1973, the preponderance of the Western Shoshone people still lived within the tract described by the Treaty of Ruby Valley, which had been occupied by their ancestors a century earlier.

In 1945, Congress enacted the Indian Claim Commission Act (25 US.C. §§ 70, *et seq.*) which created the Commission ("ICC") to hear and decide claims brought upon behalf of the various Indian tribes against the United States, including "claims arising from the taking of the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occu-

pied by the claimant without . . . payment . . . or compensation." (25 U.S.C. § 70a.) ICC decisions were reviewable by the Court of Claims. Upon the filing of the ICC's report with Congress, in which the Commission decided that the Indian claimants had a right to compensation, followed by congressional appropriation to pay the claim and the acceptance of that fund, the claimant's action was deemed finally determined and the claim itself was deemed fully discharged by the United States. (25 U.S.C. § 70u.)

In 1951, various Shoshone tribes brought an action before the ICC claiming damages for the deprivation of their former tribal lands. (*Shoshone Tribe of Indians of the Wind River Reservation, Wyoming, et al. v United States,* ICC Docket No 326.) One of the co-petitioners in that proceeding is the Temoak Band of Western Shoshone, who brought suit as the representative of the Western Shoshone. Paragraph 25 of that complaint charged that the United States, in violation of the rights of the Western Shoshone and the provisions of the Treaty of Ruby Valley, "has disposed of a large part" of the land described in the Treaty of Ruby Valley "to settlers and others, or has seized and converted a large part of the said lands to its own use and benefit, without any compensation . . . ." (*Quoted in Western Shoshone Identifiable Group v. United States*, 35 I.C.C. 457, 461-62 (1975).) The ICC in 1962 rendered an interlocutory decision in which the Commission said that the Western Shoshone constituted an identifiable group, that they had had exclusive use and occupation of, and, hence, aboriginal title to 22 mil-

lion acres in Nevada, including the acreage involved in the present case. The ICC also noted that "the United Staes, without payment of compensation, acquired, controlled, or treated these lands as if they were public lands." (Finding 26, *Shoshone Tribe, supra*, 11 I.C.C. at 416.) A stipulation was entered in 1966 in which the parties agreed that July 1, 1872, would be deemed the date of taking for the purpose of valuation, and, in 1972, the Commission entered another interlocutory order setting the value of the land as of the stipulated dated. (*Western Shoshone Identifiable Group v. United States*, 29 I.C.C. 5 (1972).)

In 1974, a group of Western Shoshone, including the Danns, who did not belong to the Temoak Band, tried to intervene in the proceeding before the ICC, in order to remove from the pending claim certain lands, including those which are the subjects of this litigation. The ICC rejected the intervention petition, and that decision was affirmed by the Court of Claims. (*Western Shoshone Legal Defense & Education Ass'n v. United States*, 531 F.2d 495 (1976).) As the Court of Claims observed, the intervention effort sprang from an intertribal dispute among the Western Shoshone "over the proper strategy to follow in this litigation," *i.e.*, whether to claim that their lands had been taken by the United States and that substantial compensation was therefore due, or to insist that the lands had never been taken and are still owned by the Indians. (*See* 531 F.2d at 503)

In November, 1976, the Temoak Bands changed course and adopted the position taken by the unsuccess-

ful intervenors that Indian title to the lands described in the Treaty of Ruby Valley was retained by the Indians. They then sought recognition of their ownership, rather than money damages for the taking. The Temoak Bands petitioned the Secretary of the Interior in February, 1977, for an administrative determination that the Western Shoshone hold equitable title to the treaty lands. The Indians also requested the Commission to stay its proceedings pending the Secretary's determination. The Commission denied the request for a stay, and on August 15, 1977, the Commission announced the completion of proceedings before it and issued its final award. (40 I.C.C. 305.) The Indians appealed the denial of the stay to the Court of Claims, and the United States also filed an appeal. These appeals are still pending before the Court of Claims. The Secretary of the Interior has not thus far made a decision about the administrative determination of title.

The district court held that the 1962 order of the ICC, reported at 11 I.C.C. 387, estopped the Danns from asserting that the Indians retained beneficial ownership of the Western Shoshone's Nevada lands. On appeal, the Danns contend that the 1962 order is not entitled to any preclusive effect against them because (1) the Danns were not parties to the ICC action; (2) the order is not final; (3) the questions of title and taking were not actually litigated in the ICC action; and (4) the title issue involved in this case is not the same as the issue presented before the Commission. For the purposes of this appeal, we assume, without deciding, that the final judgments and orders of the ICC have

preclusive effect under the doctrine of *res judicata*. However, even on that assumption, the doctrine does not foreclose litigation of the title issue in this case. The bar and merger aspects of *res judicata* are inapplicable because no final judgment has been entered. It is therefore unnecessary to resolve the question whether the Danns were or were not "parties" to the ICC litigation by virtue of any representation of the Shoshone Tribes in the litigation.[1] Claims before the ICC proceed in three steps: decision whether the claimant Indians ever had title to the land for which they are seeking compensation; establishment of the value of the lands claimed to have been taken as of the time of taking; and a determination of any offsets against the Indians by the Government. The 1962 order of the ICC relied upon by the district court marked the conclusion of the first phase of the Western Shoshone litigation. This phase of the litigation before the Commission, however, is not deemed a final judgment within the meaning of the ICC Act. "Finality" for this purpose does not attach until the Commission has filed its final report with Congress and the Indians have actually been paid the compensation owed them (25 U.S.C. § 70u.) [2]

---

[1] Some difficult issues are presented in deciding the identity of parties question in the context of tribal litigation before the Commission. (See Fort Sill Apache Tribe v. United States, 477 F.2d 1360, 1362 (Ct. Cl. 1973); Cherokee Freedmen v. United States, 161 Ct. Cl. 787 (1963). See also Western Shoshone Legal Defense & Educ. Ass'n v. United States, supra, 531 F.2d 495.)

[2] The title phase of a decision by the ICC is not a final order. (Caddo Tribe of Oklahoma v. United States, 155 F. Supp. 727 (Ct. Cl. 1957).) **Caddo** arose in the context of an attempt to appeal a title-phase decision. Although **Caddo** was directly concerned with the question of finality only for the purpose of determining appealability, the **Caddo** court also commented on the issue preclusion question:

The lack of finality of the 1962 ICC decision is underlined by the rationale of the Court of Claims in rejecting the Dann's right to intervene in the litigation. The court jusified its' affirming denial of intervention by noting that denial would not preclude a later effort by the Western Shoshone to reopen the question of title, even after the proceedings before the ICC had been completed. The court said:

> "It may . . . be noted that the bar of Section 22 does not fall until payment . . . . If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award . . . . That course is still open if the majority of the Identifiable Group can be persuaded to follow it." (*Western Shoshone Legal Defense & Education Ass'n., supra*, 531 F.2d at 503 n. 16.)

Of equal importance from the standpoint of collateral estoppel [issue preclusion], the title issue in this case was neither actually litigated nor actually decided in the proceedings before the ICC. The key question in this case is not whether the Indians had title, but

---

[2] **Continued**

"Under the circumstances, the views expressed in the order appealed from have not yet assumed finality, and until final judgment is entered disposing of the entire proceeding, the Commission is at liberty to alter the views therein expressed. Accordingly, there can arise no problem of estoppel by judgment [issue preclusion] for either party." (155 F. Supp. at 738.)

Although the ICC Act was amended in 1960 to preclude appeals of interlocutory determinations establishing liability, the Court of Claims has since held that **Caddo**'s analysis of "what constitutes a final decision within the context of the . . . Act" is still applicable. (Seminol Indians of Florida v. United States, 471 F.2d 614, 615 (Ct. Cl. 1973).)

whether the title that they had was in any way extinguished by the Government. The extinguishment question was not placed in issue in the litigation before the ICC. The title phase of the litigation before the ICC was whether the Indians ever had aboriginal title before the arrival of the white man, and not whether title thereafter had passed to the United Staes. As the Court of Claims observed in its analysis of the title phase of the Western Shoshone suit, "the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose." (513 F.2d at 500.) Whatever may have been the implicit assumptions by both the United States and the Shoshone Tribes during the litigation before the ICC, the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided.[3]

---

[3] The Temoak Bands, in their amicus brief, contend that the voluntary selection of a compensation strategy and rejection of a title recognition strategy, described by the Court of Claims (513 F.2d at 503), never took place. They argue that at the time they brought their action before the ICC and for 25 years thereafter, they had no taking/title choice because they could not have sued the Government for recognition of their title claims. They argue that the ICC had no jurisdiction to quiet title, and quite title relief was not otherwise available to the Western Shoshone because the United States had not yielded its immunity from suit for this purpose. (See, e.g., Malone v. Baldwin, 369 U.S. 643 (1962).) The Temoak Bands contend that an election of remedies did not become possible until the fall of 1976, when Congress amended the Administrative Procedure Act to waive sovreign immunity to suits seeking equitable and declaratory relief for unlawful official actions. (5 U.S.C. §§ 702, 703.) Until the amendment, the Western Shoshone could seek only administrative or judicial relief on the theory that their ownership had never been extinguished and that government officials were unlawfully treating their lands as "public lands." A month after the amendment, the Temoak Bands moved for a stay in the ICC proceedings in order to petition the Secretary of the Interior for administrative determination of their rights. The Temoak Bands' contention is supported by United States v. Creek Nation, 427 F.2d 743,

The judgment is reversed and the cause it remanded to the district court for further proceedings consistent with the views herein expressed.

---

[3] Continued

745-48 (Ct. Cl. 1970). We need not and do not decide the contentions of the Temoak Bands at this juncture because it is unnecessary to the rendition of this decision. We mention the argument because it emphasizes the legal difficulties of the Government's contention that the collateral estoppel doctrine should be applied to foreclose the Danns from litigating the extinguishment issue. (Restatement of Judgments 2d § 68.1(b)(ii).)

APPENDIX C

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-K

WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA

Plaintiff,

vs.

THE UNITED STATES OF AMERICA

Defendant.

PLAINTIFF'S DISCHARGE OF COUNSEL AND ADDITIONAL MOTION TO STAY PROCEEDINGS

---

1. COMES NOW The Temoak Bands of Western Shoshone Indians, Nevada, a federally recognized Reorganization Act tribal government and the exclusive representative of the Western Shoshone Identifiable Group, and hereby notifies the Indian Claims Commission that said Temoak Bands has terminated any contract which may exist between said Temoak Bands and Robert W. Barker, Donald C. Gormley and the Law Firm of Wilkinson, Cragun and Barker, and on its own behalf, and on behalf of the Western Shoshone Identifiable Group, discharges said Robert W. Barker, Don-

ald C. Gormley and the Law Firm of Wilkinson, Cragun and Barker as counsel of record and attorneys for The Temoak Bands of Western Shoshone Indians, Nevada and the Western Shoshone Identifiable Group for the reason that said attorneys have failed to protect the interests of the Western Shoshone Identifiable Group and Plaintiff does not have confidence that said attorneys will act in the best interest of the Identifiable Group in the future.

2. The Temoak Bands of Western Shoshone Indians, Nevada, on its own behalf, and on behalf of the Western Shoshone Identifiable Group reasserts its Motion for a Stay of Proceedings for the additional reason that the Representative Plaintiff and the Western Shoshone Identifiable Group are without counsel and time is needed for the Representative Plaintiff to obtain new counsel to protect its interests before the Commission. The Temoak Bands of Western Shoshone Indians, Nevada, represents to the Commission that it is endeavoring to obtain substitute counsel with due diligence and is petitioning the Secretary of the Interior to assist it in obtainng and approving new counsel and to intervene in the proceedings to protect the interests of the Identifiable Group until such time as substitute counsel enters his appearance.

3. The Temoak Bands of Western Shoshone Indians, Nevada, hereby moves the Commission, supplementing paragraph 1 of its Motion to Stay Proceedings, dated November 11, 1976, to retain the said Temoak Bands of Western Shoshone Indians, Nevada as exclu-

sive representative of the Identifiable Group until such time as a broader based Indian Reorganization Act Government is formed for the reason that no such government currently exists.

The authority to discharge the attorneys and to file this Discharge of Counsel and Additional Motion to Stay Proceedings and further reasons therefore are set out in the attached resolution, duly passed by the Tribal Council of The Temoak Bands of Western Shoshone Indians, Nevada.

DATED this 20th day of January, 1977.

s/ LESLIE BLOSSOM

CHAIRMAN, Business Council of
The Temoak Bands of Western Shoshone Indians, Nevada.
Battle Mountain Tribal Offices
Battle Mountain, Nevada 89820

I HEREBY CERTIFY that I mailed a copy of the foregoing Discharge of Counsel and Additional Motion to Stay Proceedings to Robert W. Barker, 1735 New York Avenue, N.W., Washington D.C., 20006; and to Dean K. Dunsmore, Attorney for Defendant, United States Department of Justice, Washington, D.C., 20530, this 20th day of January, 1977.

s/ LESLIE BLOSSOM

RESOLUTION OF THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA

WHEREAS, representatives of the Western Shoshone People originally retained the predecessors of the current claims lawyers for the express purpose of enforcing their rights under the Treaty of Ruby Valley; and, the current claims lawyers and their predecessors have failed and refused to enforce these rights and have derrogated said Treaty of Ruby Valley; and,

WHEREAS, Robert W. Barker, Donald C. Gormley, the firm of Wilkinson, Cragun and Barker have failed to protect the property interests of the Western Shoshone People; and,

WHEREAS, said attorneys have failed to explain to the Western Shoshone People the full consequences of actions taken by said attorneys on behalf of the Western Shoshone Identifiable Group; and

WHEREAS, said attorneys have been unresponsive to the requests made by members of the Western Shoshone Identifiable Group; and,

WHEREAS, said attorneys have placed themselves in a position where their actions on behalf of the Western Shoshone Identifiable Group cannot be effectively controlled by the members of the Identifiable Group; and,

WHEREAS, there appears to be a conflict of interests between said attorneys who appear to be interested only in maximizing the amount of the claim before the Indian Claims Commission and the Western Shoshone People who desire to preserve as far as possible their aboriginal and treaty rights to their sacred ancestral lands; and,

WHEREAS, The Temoak Bands of Western Shoshone Indians, Nevada, has been held by the Indian Claims Commission and the Court of Claims to be the exclusive representative of the Western Shoshone Identifiable Group in prosecuting the claim of the Identifiable Group before the Indian Claims Commission and, as such, has a responsibility to insure that the interests of the Western Shoshone People are not jeopardized; and,

WHEREAS, in the opinion of the Business Council of The Temoak Bands, said attorneys have lost the confidence of the Western Shoshone People; and,

WHEREAS, it is of the greatest importance that the legal representatives of the Western Shoshone Identifiable Group be lawyers who have the confidence of the Western Shoshone and can be relied upon to represent the interests of the Western Shoshone People as these People believe them to be; and,

WHEREAS, no organized and politically responsive entity is known to the Business Council of The Temoak Bands which is capable of acting as exclusive representative of the Western Shoshone Identifiable

Group and therefore the Temoak Bands, in view of its expanding political jurisdiction, should remain as exclusive representative for the Western Shoshone Identifiable Group until such time as a broader based Indian Reorganization Act Government is formed and designated as exclusive representative for the Identifiable Group;

NOW, THEREFORE, BE IT RESOLVED BY THE BUSINESS COUNCIL OF THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA:

1. That any contract which may exist between the Temoak Bands of Western Shoshone Indians, Nevada, and/or The Western Shoshone Identifiable Group and Robert W. Barker, Wilkinson, Cragun and Barker, and any associates thereof, is hereby terminated.

2. That the Chairman is assigned the responsibility of locating prospective replacement counsel and reporting his findings to this council.

3. That the Chairman petition the Secretary of the Interior explaining our plight and requesting assistance in replacing counsel before the Indian Claims Commission and to intervene in the Claim Docket 326-K pending there to protect the interests of the Western Shoshone Identifiable Group.

4. That the Chairman file a document in the Indian Claims Commission discharging Robert W. Barker, Donald C. Gormley and the firm of Wilkinson, Cragun

and Barker as counsel for the Temoak Bands of Western Shoshone Indians, Nevada, and The Western Shoshone Identifiable Group and requesting a stay of proceedings until such time as replacement counsel can enter an appearance.

5. That the Chairman supplement paragraph 1 of the Motion to Stay Proceedings dated November 11, 1976 requesting that The Temoak Bands remain as exclusive representative of the Identifiable Group until such time as a broader based Indian Reorganization Act Government can be formed.

s/EDWARD McDADE

s/MARVIN McDADE

s/LESLIE BLOSSOM

C-8

CERTIFICATION

I HEREBY CERTIFY that the Resolution set forth above was adopted by the Business Council of The Temoak Bands of Western Shoshone Indians of Nevada at a meeting at South Fork, Nevada, on the 14th day of November, 1976, at which a quorum was present, and by a vote of three (3) for and two (2) against.

s/MARVIN McDADE
SECRETARY, Business Council
of The Temoak Bands of Western
Shoshone Indians of Nevada.

s/LESLIE BLOSSOM
CHAIRMAN, Business Council
of The Te-Moak Bands of Western
Shoshone Indians of Nevada

RESOLUTION NO. 77-TM-03

APPENDIX D

TE-MOAK BANDS OF
WESTERN SHOSHONE
P.O. Box 1607
Elko, Nevada 89801

January 19, 1977

Secretary of the Interior
Department of the Interior
Washington, D.C.

Re: Western Shoshone Identifiable Group,
Represented by the Temoak Bands of Western
Shosnone Indians vs. United States
Indian Claims Commission Docket No. 326-K

Dear Mr. Secretary,

I am the Chairman of the Temoak Bands of Western Shoshone Indians which is representing all Western Shoshone people in a claim before the Indian Claims Commission. Supposedly, our tribal council is supposed to be in charge of the litigation and according to the Indian Claims Commission and the Court of Claims we have "elected" to give up our title to our ancestral lands in order to get money damages.

Really, the claim has been run by the claims lawyers who have included lands in the claim that we still claim title to. Despite repeated requests these lawyers have refused to test the title to these lands before including them in the claim. Recently a group of Western Shoshone Indians attempted to assert title to these

lands in a trespass suit but the judge said they couldn't because the lands were included in the claim. The claims lawyer has told us many times that his actions would not affect our title but it has.

There are many strange things about the way these lawyers have operated. They no longer report to us but to a "claims committee" which was elected by just a few Indians and has no rules or any way for the people to control them. These lawyers not only have refused to protect the title to the lands we still have but have fought our people who have tried to do it themselves through the Western Shoshone Legal Defense and Education Association.

We have now fired these claims lawyers and are looking for a replacement. I have been directed by the Business Council to appeal to you to assist us in replacing the lawyers and to intervene in the Indian Claims Commission case and protect our interests in controlling our claim. We feel that the Indian Claims Commission pays more attention to those lawyers who work there all the time than to us.

The United States has moved to dismiss the claim entirely because we have asked the Commission to stay its proceedings until we find out what our rights are. We feel this is very unfair. We think the United States should help us solve our problems instead of taking advantage of our problems with our lawyers.

The United States has told the Commission that they do not have to pay atention to us, that only lawyers

can speak for us. We are told that the Secretary of the Interior can provide legal help to Indians even when the United States is on the other side. Would you please help us. Many of our people do not speak English and are very poor. These lands are very important to our people and our religion. If we lose them our people will no longer be Western Shoshone because Mother Earth is our religion.

I am sending you a copy of the resolution and the paper we are sending to the Indian Claims Commission. I have sent other papers to Mr. Joe Membrino in your solicitor's office.

Respectfully yours,

s/ LESLIE BLOSSOM
Chairman, Temoak Bands of Western
Shoshone Indians

TE-MOAK BANDS OF
WESTERN SHOSHONE
P.O. Box 1607
Elko, Nevada 89801

February 4, 1977

Secretary of the Interior
Department of the Interior
Washington, D.C.

Re: Termination of Attorney Contracts and Attorney-Client Relationship — Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians vs. United States, Indian Claims Commission. Docket No. 326-K

Dear Mr. Secretary,

In a letter dated January 19, 1977, I informed you that the Tribal Council of the Temoak Bands of Western Shoshone Indians had terminated any attorney contracts and attorney-client relationship which may have existed between the Temoak Bands and the Western Shoshone Identifiable Group, on the one hand, and Robert W. Barker, Donald C. Gormley, the firm of Wilkinson, Cragun and Barker and any associates, on the other. At the direction of the Tribal Council, I requested your assistance in replacing these lawyers.

Since the sending of this letter and the filing of our Discharge of Counsel with the Claims Commission, I have been informed that Mr. Barker is refusing to acknowledge our right to terminate his representation of the Temoak Bands and the Identifiable Group for which the Temoak Bands is exclusive representative. Mr. Barker has filed a pleading in the Indian Claims Commission stating among other things that he has not been discharged because no action has been taken by the Secretary of the Interior and that we have not requested such action.

It is our opinion that the Tribal Council of the Temoak Bands of Western Shoshone Indians has the power to choose which attorneys represent the Temoak Bands and, as exclusive representative of the Western Shoshone Identifiable Group, which attorneys represent the Identifiable Group. We have property exercised that power under our Tribal Constitution

However, in the event that the discharging of the attorneys does require some action by you, or your representative, I hereby request, under authority of the Resolution of the Tribal Council, that you immediately take any action necessary to terminate any attorney contracts and any attorney-client relationship which may exist between the Temoak Bands of Western Shoshone Indians and the Identifiable Group it represents, and Robert W. Barker, Donald C. Gromley, the firm of Wilkinson, Cragun and Barker, and any associates of theirs.

In addition to the reasons that are set out in my

previous letter and resolution attached to that letter, we state as further cause for termination that the attached pleading filed in the Indian Claims Commission is clearly inconsistent with any attorney-client relationship between Mr. Barker and the Temoak Bands. Not only does that pleading attack the position adopted by the Temoak Bands, but adds insult to injury by designating the pleadings filed on behalf of the Temoak Bands, under authority of attached resolutions of the Tribal Council, as pleadings "filed by Mr. Blossom". Mr. Barker continues to ignore actions of the Tribal Council and implies that such action are taken by me as a private individual.

The Temoak Bands will not tolerate the arrogance of Mr. Barker and his continued resistance to our wishes and interests while claiming to act as our attorney. The Temoak Bands of Western Shoshone Indians respectfully demands that you take all action necessary to stop Mr Barker and his associates from acting as attorney for the Temoak Bands and the Identifiable Group it represents.

Respectfully yours,

LESLIE BLOSSOM
Chairman, Temoak Bands of Western
Shoshone Indians

cc: Joe Membrino, Solicitor's Office
Robert W. Barker
LB:M

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office Of The Solicitor
Washington, D.C. 20240
February 24, 1977

Leslie Blossom, Chairman
Te-Moak Bands of Western
Shoshone Indians
P.O. Box 1607
Elko, Nevada 89801

Dear Mr. Blossom:

This is in further response to your letter of February 4, 1977, in which you asked whether termination of claims attorney contract I-1-Ind. No. 42013, Indians Claims Commission Docket 326-K, requires Departmental action to be effective.

It is the position of this Department, generally, that no tribe can or should be compelled to be represented by an attorney against its wishes.

The tribe's right to discharge its attorney is implied in its employment contract and no attorney whose contract has been terminated may insist that the attorney-client relationship continue after the client has discharged him. This position is well supported by the law and by the Code of Professional Responsibility which sets standards of conduct for attorneys.

Although an attorney may be discharged for any reason, the client may be responsible for compensating the attorney for the value of his services up until the time he is discharged.

The provision in contract No. 42013 which states that the agreement may be terminated by the Secretary of the Interior "only for proper cause, after a hearing . . ." is merely a limitation on the *Secretary's* power to discharge the claims attorney. It is not the exclusive means by which the Shoshone can discharge Attorney Barker. For the Secretary to insist upon continuation of an attorney's employment by an Indian tribe against that tribe's wishes would conflict with settled principles of law and ethics and clearly would be inconsistent with the Government's policy of self-determination for Indian tribes.

It should be understood, however, that the Department expresses no opinion as to whether the recent action of the Te-Moak Bands is effective to terminate attorney contract No. 42013 in whole or in part. That issue is pending before the Indian Claims Commission and, as stated previously, we believe that that forum is the appropriate one to decide the question.

Sincerely,

William A. Gershuny
Acting Associate Solicitor
Division of Indian Affairs

cc: Robert W. Barker, Esq.
Field Solicitor, Phoenix
BIA Area Office, Phoeinx
BIA Superintendent, Eastern Nevada Agency
Assistant Attorney General, Lands &
Natural Resources Division